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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LEBANON FIFITA et al., Defendants and Appellants.	B294952 (c/w B297071) (Los Angeles County Super. Ct. No. YA094013)

APPEALS from judgments of the Superior Court of Los Angeles County. Curtis B. Rappe, Judge. Affirmed and remanded with directions.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant Lebanon Fifita.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant Samisoni Lauaki.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant Otoniel Ventura-Leon.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Noah P. Hill and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

After a shooting attack on the Tongan Crips Gang (TCG), TCG members went on a murderous rampage within surrounding rival gang territories. For their crimes, defendants and appellants Lebanon Fifita (Fifita), Samisoni Ilifeleti Lauaki (Lauaki), and Otoniel Ventura-Leon (Ventura-Leon) were charged and tried together by jury.[1]

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[1] Codefendants Taniela Fonoifua (Fonoifua), Fonuamana Ofeina Fuahala (Fuahala), and Calvin Leonard Tonga (Tonga) were also charged and tried with appellants. In the third amended information, appellants, Fuahala, and Tonga were charged with conspiracy to commit murder (count 1); Fonoifua was charged with the murder of Sheila Renee Gomez (Gomez; count 2) and the attempted murder of Henry Godines (Godines; count 3); Lauaki and Fonoifua were charged with the murder of Aldalberto Salcedo III (Salcedo; count 4); appellants, Fuahala, and Tonga were charged with the attempted murder of Sabrina Young (Young; count 5) and the murder of Kenneth Campos (Campos; count 6); Fonoifua was charged with the attempted murder of Hernesto Ruiz (Ruiz; count 7); Fifita was charged with possession of a firearm by a felon (count 8); Fonoifua was charged with possession of a firearm by a felon (count 9); and appellants, Fuahala, and Tonga were charged with the attempted murder of Harry Coburn (Coburn; count 10).

The jury found Ventura-Leon guilty of: (1) conspiracy to commit murder (Pen. Code, § 187, subd. (a); count 1),[2] with a gang enhancement (§ 186.22, subd. (b)(1)(C)); (2) the attempted willful, deliberate, and premediated murder of Young (§§ 664, 187; count 5) with a gang enhancement and a gun enhancement (§ 12022.53, subds. (d) & (e)(1)); (3) the first degree murder of Campos (§ 187, subd. (a); count 6) with a gang enhancement and a gun enhancement; and (4) the attempted willful, deliberate, and premediated murder of Coburn (§§ 667, 187, subd. (a); count 10) with a gang enhancement and a gun enhancement.

Lauaki was acquitted of the murder charge of Salcedo (count 4), but was found guilty of (1) conspiracy to commit murder (count 1) with a gang enhancement; (2) the attempted willful, deliberate, and premeditated murder of Young (count 5) with a gang enhancement and a gun enhancement; (3) the first degree murder of Campos (count 6) with a gang enhancement and a gun enhancement; and (4) the attempted willful, deliberate, and premediated murder of Coburn (count 10) with a gang enhancement and a gun enhancement.

The jury found Fifita guilty of (1) conspiracy to commit murder (count 1) with a gang enhancement; (2) the attempted willful, deliberate, and premeditated murder of Young (count 5) with a gang enhancement and a gun enhancement; (3) the first degree murder of Campos (count 6) with a gang enhancement and a gun enhancement; (4) felon in possession of a firearm (§ 29800, subd. (a)(1); count 8); and (5) the attempted willful,

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

deliberate, and premediated murder of Coburn (count 10) with a gang enhancement and a gun enhancement.[3]

According to the appendix attached to Fifita's opening brief, appellants were given lengthy state prison sentences.[4]

Appellants timely appealed the judgments of conviction, raising a host of arguments. The gang enhancement left unimposed against Fifita in connection with his sentence on count 10 is stricken. In all other respects, we affirm the judgments.

FACTUAL BACKGROUND

I. *Prosecution's Evidence*

A. TCG members Fonoifua and Fuahala attacked by rival gang in Gardena

On July 6, 2015, Los Angeles County Sheriff's Deputy Anthony Maldonado arrived at Marine Avenue in Gardena responding to the scene of an assault. There, he found Fonoifua

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[3] Fonoifua was found guilty of the first degree murder of Gomez (count 2), the attempted murder of Godines (count 3), the first degree murder of Salcedo (count 4), the attempted murder of Ruiz (count 7), and possession of a firearm by felon (count 9). Fuahala and Tonga were found guilty of counts 1, 5, 6, and 10. Fonoifua, Fuahala, and Tonga are not parties to this appeal. However, Tonga and Fonoifua have a separate appeal pending. (*People v. Tonga et al.*, B301310.)

[4] No one objects to the appendix offered by Fifita. The parties' briefs set forth different sentence totals, but the discrepancies are not cured by either the parties' briefs or the appellate record. Since no appellant challenges the length of his sentence, it has no bearing on the issues raised in this appeal.

and Fuahala injured from multiple gunshot wounds. A grey Chevy Malibu with the license plate number "6ZPU213" was parked nearby. Collette Mapu (Mapu), Fonoifua's girlfriend, testified that she drove that car to the location to pick up Fonoifua.

B. The murder of Gomez and the attempted murder of Godines

On October 6, 2015, sometime after 4:30 p.m., Godines and Gomez were at Lennox Park on a bench charging their phones using an outlet on an electric pole. Godines was homeless at the time. The area was claimed by the Lennox 13 gang, with whom Godines sometimes "hung out with."

At around 8:30 p.m., Gomez and Godines saw two Pacific Islanders approach them with guns. One had a large frame and weighed about 400 pounds. The other one was smaller in frame and had long hair. Godines and Gomez began to run. Both of them were shot.

As they reached a wall to a swimming pool, Godines saw a third Pacific Islander with a gun with braids going down to the shoulders. The male had just walked out of a breezeway. He fired several shots hitting both Godines and Gomez. Both fell to the ground. The shooters left. Godines then saw a white car and a green van speeding away.

At the time, Cristian Barron (Barron) was at the corner of Lennox Boulevard and Condon Avenue by the pool area. A white sedan pulled up and stopped on Condon Avenue very close to him. Fonoifua exited the car through the front passenger door and walked hurriedly into the park. Fonoifua was of Pacific Islander descent, was tall, and had curly hair. The driver of the

car remained inside the car. Barron then heard gunshots. Fonoifua emerged from the park and got back into the car. The car took off. Barron observed there was no one else inside the car other than the driver and Fonoifua. The car went up Lennox Boulevard and turned on Truro Avenue. A second car, a bigger and darker car (or SUV or minivan) followed and turned the same way.

At the time, Veronica Perez (Perez) was walking on Lennox Boulevard from Condon Avenue going eastward. She heard multiple gunshots. Less than a minute later, she saw a light-colored car speeding past her on Lennox Boulevard. The car and a dark-colored SUV-type vehicle both turned left on Truro Avenue.

Jackie Rodriguez was inside a building on Condon Avenue when she heard gunshots and threw herself to the floor. She looked out the window and saw a Chevy Malibu on Condon Avenue and Lennox Boulevard near a breezeway leading to the park. She also saw a black four-door hatchback SUV. The cars traveled up Lennox Boulevard.

Los Angeles County Sheriff's Deputy Robert Maas responded to the scene and spoke to Perez. She told him that she saw a white Chevy Malibu being driven by a Hispanic adult wearing a flat-billed hat. The car was followed by a dark hatchback four-door vehicle, newer model. After the shooting, the two vehicles traveled eastbound and turned north on Truro Street.

Barron was given a six-pack photograph lineup that day and he eliminated everyone except Fonoifua and someone else,

eventually picking the other based on his gut feeling because he was uncertain that day.

Gomez died from two fatal gunshot wounds to her back. Godines, shot 11 times and stabbed several times, was induced into a coma for a month and a half. After awaking from the coma, he was shown video footage of the shooting outside the donut shop (discussed below). To Godines, the individuals approached the victims in the video the same way they approached him and Gomez.

Bullet casings and fragments were recovered from the Lennox Park shootings.

C. The murder of Salcedo; Fonoifua identified

On October 17, 2015, at around out 4:30 p.m., Nakoi Coleman (Coleman) was driving eastbound on Sepulveda Boulevard when she drove past Avalon Boulevard getting ready to turn into a gas station located at the intersection. A silver car with four doors exited the gas station, turned right, and stopped in the middle of the street, blocking Coleman's car. The driver and passenger exited the car and from approximately 15 feet away, repeatedly shot at 15-year-old Salcedo, who was with his girlfriend, Andrea McMihelk (McMihelk). Salcedo, who was from the Scottsdale Piru gang, fell, and McMihelk hid behind a wall. Thereafter, the driver walked closer to Salcedo and shot him six more times. The two shooters entered the car, which traveled east and then made a U-turn to travel west.

Coleman remembered the driver as someone in his 20's, six feet tall, thin, having a light brown skin tone, and of mixed race, possibly Black, Samoan, or Hispanic. The driver wore a black T-shirt, dark blue jeans, and a black baseball cap. The driver also

had a tattoo on one of his forearms. The driver used a black semi-automatic gun. McMihelk remembered that one of the shooters wore a black hat and used a black gun.

Coleman remembered the passenger to be in his 20's, about six feet tall, heavyset, and having the same skin tone as the driver. He was also of similar race as the driver. He had finely curled hair and wore a goatee. The passenger wore a white shirt and jeans. He was using a black gun.

Manuel Sandoval (Sandoval) was eating at a restaurant on Sepulveda Boulevard, when he heard five to seven gunshots. Sandoval looked toward the street and saw a white car speeding eastbound. Sandoval observed two males inside the car. The person in the front passenger seat held a gun. The passenger had black hair, about two inches long.

Manuel Alcaraz was at the same restaurant. He heard about 20 gunshots and saw a four-door white or gray car on the street. The passenger held out his gun outside the window and pointed it at a man.

Responding sheriff deputies recovered 15 separate nine-millimeter shell casings and two .45 caliber shell casings. Los Angeles County Sheriff's Detective Q Rodriguez responded to the scene and recovered surveillance video from the gas station. The video captured the perpetrators shooting the victim and driving away in a silver car eastbound.

Salcedo died from multiple gunshot wounds.

Coleman eventually identified Fonoifua, who has a TCG tattoo on his right forearm, as either the passenger or the driver on August 15, 2017. A photograph of Lauaki matched descriptions given by Coleman, in terms of hair and physique.

McMihelk also identified Fonoifua as one of the shooters.

Cell tower evidence demonstrates that Lauaki's phone and Fonoifua's phone were in the area of the crime sometime during the Noon hour. Fonoifua's phone was near the gas station around 4:00 p.m. The Glock 19 firearm recovered later from a toilet in Ventura-Leon's house was determined to be the same firearm that ejected the casings found at the gas station crime scene. As discussed below, the .45 caliber casings recovered from this crime scene were found to have been fired from a Taurus pistol recovered from a traffic stop of a Dodge van. That gun was under Lauaki's seat at the time of the stop.

D. A warning from a rival gang member

On November 8, 2015, several attendees at a graduation celebration at the neighborhood Tongan church on Lennox Boulevard encountered a Hispanic male on a bicycle who approached and pulled out a gun. The witnesses of the event went inside and informed the celebrating family that they had to leave because something was about to "go down."

E. The attempted murder of Coburn

On the following day, November 9, 2015, at about 12:15 a.m., security guards at the Lennox Middle School noticed two cars slowly driving southbound on Buford Avenue. The car in front was a silver four-door sedan, possibly a Marquis. A passenger was sitting in the back of the sedan. Following behind the Marquis was an old Plymouth Voyager van. A passenger was sitting in the front of the van along with the driver. The sedan slowed and someone said, "'What's up'" to the guards. The two cars turned right on 111th and minutes later, both cars returned on 111th, making a left turn on Buford Avenue. One of the

guards followed them in his car. But shortly thereafter, the two cars made a U-turn and traveled southbound, passing the guard's vehicle. The guard turned into an elementary school and heard gunshots.

At around that time, Coburn was walking in the area of 111th Place and Redfern Street, when someone behind a parked truck walked toward him and began shooting at him from 10 feet away using a black nine-millimeter handgun. While he could not see who the shooter was because of poor lighting, he could see that the shooter was about five feet seven inches tall. The shooter was wearing a hooded sweatshirt, blue jeans, and black boots.

Coburn's father was on his porch and had witnessed a tan Crown Victoria with tinted windows driving on 111th Place and stopping at 111th Place and Redfern Avenue before the shots. There were four people inside wearing hoodies. The car was behind a truck. Coburn's father heard a door close and three seconds later, six shots rang out. The door slammed again and the car left the area "peel[ing] rubber." Coburn was shot five times. He became disabled due to his injuries.

Deputy Maldonado responded to the shooting at about 12:18 a.m. A bullet fragment was found. Seven bullet casings were found at the scene.

Videos from two cameras were also taken from a residence near 111th and Redfern Avenue. Sheriff's Detective William Cotter testified that in looking at the video, he noticed that a van at the scene at the time of the shooting had a missing molding. The van, a silver Dodge Caravan or Plymouth Voyager, often parked in front of Ventura-Leon's home, was at some point

impounded by the police. A Mercury Marquis, impounded later by the police, was also captured by that same camera. The video showed the van arriving first and the Marquis pulling to the curb and having its lights turned off. A person exited from the passenger side at 12:14 a.m. Shortly thereafter, the two vehicles left.

Cell phones belonging to Tonga and Ventura-Leon were within the cell tower coverage area for the crime scene at 12:15 a.m. This was consistent with the two cars captured by video near the scene of the crime.

F. Meeting at a local restaurant

Later that same morning, at around 2:23 a.m., the Marquis and the van pulled into the parking lot of a Yoshinoya restaurant on Hawthorne Boulevard in Inglewood. The restaurant is within the territory of the TCG and is a meeting place for its members. Five individuals eventually entered the Yoshinoya restaurant. Law enforcement officers who were familiar with TCG members identified the individuals in the video as Fifita,[5] Ventura-Leon, Lauaki, Tonga, and Fuahala. They all walked out of the restaurant after roughly 15 minutes and gathered in the parking lot.

While they were conferring in the parking lot, a surveillance video showed someone entered the video frame at the very edge.

At around 3:00 a.m., the two vehicles (the Marquis and the van) left the parking lot. A minute later, the video on Burin Avenue captured the Marquis and the van driving down that avenue.

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[5] Fifita's wife also identified him on the video recording.

G. TCG members chase Ricardo Gonzalez (Gonzalez)

At around 2:45 a.m., Gonzalez was riding a bicycle southbound on Hawthorne Boulevard passing the Yoshinoya restaurant. He saw a group of males in front of the restaurant. The group entered a gold Chevy. The Chevy passed Gonzalez as Gonzalez crossed over the island divider to keep riding southbound on the east side of the street. The person seated in the back of the vehicle was wearing a white T-shirt and had a little ponytail. The person appeared to be of Tongan descent and had wide shoulders.

The driver looked at Gonzalez. The Chevy, at some point, made a right into a street and reappeared again, this time traveling north towards Gonzalez. Gonzalez then crossed the middle divider again and continued riding southbound on the west side of Hawthorne Boulevard. The Chevy passed Gonzalez again. Gonzalez at this time believed the car was coming after him and continued riding toward the 105 Freeway without looking back. He then heard gunshots coming from the direction of a donut shop.

Fifteen minutes later, Gonzalez traveled back on Hawthorne Boulevard and saw officers and two individuals lying on the floor.

H. The murder of Campos and the attempted murder of Young

Around that time, Campos and his wife, Young, who were homeless, arrived at the plaza of a donut shop. They were there because donuts are given away each morning between 12:00 a.m. and 3:00 a.m. Young was scratching her lottery tickets while Campos went to the store to knock on the window. Campos then

said, "'Okay, babe, the clerk is coming.'" At some point, Young noticed a black van arriving in the alley behind the donut shop. Campos went to the side door of the store where the clerk usually handed out the donuts. Campos said, "'Run, Bri. Don't shoot.'" Gunshots rang out. Young looked up to see Campos fall to the ground. Young ran to Campos, and then looked up to see two males with guns. Young turned and began to run. She was thereafter shot[6] and fell on top of Campos.

Young was not able to get a good look at the faces of the gunmen, but noted their complexions were lighter than African-Americans. She remembered one of the gunmen had a ponytail and was holding the smaller gun. The smaller and thinner male, who used a shotgun, was wearing a black hooded sweatshirt.[7] The entire shooting was captured by surveillance video.

The shooters disappeared.

A cartridge case, multiple shell casings, and projectile fragments were recovered from the scene. One type of casing is ammunition used for SKS assault-style rifles. Tonga's cell phone contained pictures of an SKS-style rifle. The other casing was nine-millimeter and came from the same handgun used to shoot Coburn.

Campos suffered 13 gunshot wounds.

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[6] She suffered severe injuries to her legs, hips, and her reproductive system.

[7] Young identified Ventura-Leon and Tonga in court as being somehow involved in the incident, but not necessarily acting as the gunmen.

A video camera from the Lennox Academy captured the Marquis and the Plymouth appearing at the time Campos and Young walked around the donut shop. A video captured Campos and Young lying on the ground at the same time as occupants of the Marquis walked back to their car parked behind the donut shop. The Marquis was then driven away.

I. The traffic stop of Dodge Caravan; one of the murder weapons recovered

On December 1, 2015, Los Angeles County Sheriff's Deputy Michael Garcia stopped a white 2015 Dodge Caravan. Inside were Ventura-Leon, Lauaki, and Matt Apiata (Apiata). Deputies searched the van and recovered a hat from the trunk and a .45 caliber Taurus semi-automatic pistol under the front passenger carpet in the floorboard area. Lauaki was seated there at the time. Lauaki admitted that he possessed the gun and admitted to being a member of the TCG with the moniker "Sin." Lauaki also gave the deputy his cell phone number.

The next day, Los Angeles County Sheriff's Detective Imelda Bottomley interviewed Lauaki. Lauaki did not have any tattoos.

J. The attempted murder of Ruiz

On January 26, 2016, at 5:53 p.m., Ruiz was with his pregnant wife**,** Cabrea Gongora (Gongora), outside Ruiz's home in Gardena. Ruiz was smoking a cigarette standing by his car while Gongora was sitting in the passenger seat. A four-door white car approached them. Gongora thought it looked like a Kia. The car stopped and the occupants looked at Ruiz. Gongora could not see the faces of the occupants inside the car. They yelled, "'Tongan Gang Crip, man.'" The passenger, who had muscular arms and a

tattoo on one of the arms, started shooting Ruiz using a handgun. Ruiz felt himself getting shot and fell to the ground. He turned and saw the car traveling away but could not see anyone inside that car. The back of the car looked like a Kia Optima. Gongora went upstairs to tell Ruiz's mother. Ruiz suffered five gunshot wounds.

Gongora picked out two photographs from a lineup because of the build and the ponytails of those individuals. Gongora saw the gunman sporting a ponytail.

Los Angeles County Sheriff's Deputy Sandra Patino responded to the scene and found five .380 caliber casings near Ruiz's car.

K. Fonoifua is involved in a domestic conflict

Earlier that same day, Long Beach Police Officer Michael Barth had responded to a residence in Long Beach, where gunshots were heard. There the officer found bullet holes in a black Dodge Charger and two shell casings in the backyard. Fresh blood was found in one location of the yard, a walkway, and the white fence in front of the home. The blood led to the door to a garage. Deputy Barth opened the door and found Fonoifua lying there with an injury to his right hand. The hand had already been wrapped. Fonoifua revealed he punched a light after a fight with his girlfriend, causing the injury. No weapon was recovered.

L. Wiretap warrants

Wiretap warrants were obtained for the following targets in March 2016: Ventura-Leon, Fonoifua, Fuahala, Lauaki, Tonga, and Fifita.

M. The search of Ventura-Leon's house; discovery of another one of the murder weapons

On March 23, 2016, Ventura-Leon's residence was searched. The Plymouth Voyager van was parked just down the street. Ventura-Leon gave Detective Bottomley his cell phone number. A cell phone was recovered and a warrant obtained to download the contents of the phone. It contained photographs of Ventura-Leon and other TCG members, including Fonoifua.

During the same search, a pistol was recovered from an upstairs toilet's water tank. Detective Bottomley asked Ventura-Leon about the two individuals who were stopped with him in the Plymouth van. Ventura-Leon said the two individuals, Lauaki and Apiata, were like brothers to him. Apiata was a TCG member. Ventura-Leon said he used to drive the Plymouth van regularly until it broke down a month earlier.

N. The traffic stop of Fifita to recover his cell phone information

On August 10, 2016, Los Angeles County Sheriff's Deputy Claudia Castro observed a traffic stop of Fifita,[8] who was driving a black Chevy Impala. The deputies who stopped Fifita surreptitiously obtained information from his cell phone during that stop.

O. The interview of Ventura-Leon

On August 16, 2016, Detective Cotter interviewed Ventura-Leon, who was in custody for another charge, in jail. No one had been arrested for any of the murders at that time. Ventura-Leon

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[8] The traffic stop was conducted as part of a task force assigned to do surveillance on Fifita.

was shown photographs of Yoshinoya and the van used in the donut shop killing. Detective Cotter told Ventura-Leon that he was a suspect.

P. The interview of Lauaki

On August 29, 2016, Los Angeles County Sheriff's Detective Mike Davis interviewed Lauaki at a probation office in South Los Angeles, when Lauaki was at a routine check-in relating to the gun violation against him for possession of the Taurus handgun. During that interview, Lauaki said he was shot by Mexicans in Inglewood. Lauaki admitted he was a Crip and had the moniker Sin. He was shown a picture depicting himself and others at Yoshinoya. Lauaki said, "'Obviously I am the one in the middle.'" At the probation office, Detective Davis met someone named Iese Tutu (Tutu), who was a mentor figure to Lauaki.

Q. The telephone conversation between Lauaki and Tutu

On August 29, 2016, at around 9:00 p.m., Tutu called Lauaki. Lauaki said that he thought he was just going to his probation officer when police officers began talking to him. The officers were trying to solve the homicide that he was "supposedly in" and because of the "cameras and pictures," the police were discussing the possibility that he could go to prison. Lauaki said that he was not involved in the homicide, "but just a little bit after." Lauaki then said, "before it happened, I was with that group and stuff. And they, they got us on the, the, camera pictures . . . at the [Yoshinoya] right there on Century."

Lauaki said it happened the year before.

Lauaki had not yet been arrested for the murder charges in this case.[9]

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[9] Lauaki was arrested in December 2016.

R. The second interview of Ventura-Leon

Los Angeles County Sheriff's Detective Albert Carrillo interviewed Ventura-Leon in jail. He was shown a photograph of Fonoifua as a possible suspect of the murder at Lennox Park. Ventura-Leon was thereafter brought to a cell housing Fonoifua. There, Ventura-Leon gestured to Fonoifua, motioning his hand from left to right through his throat and shaking his head "'no.'"

S. Police attempt to stimulate cell phone conversation

On August 31, 2016, Deputy Castro and her partner went to Fifita's residence and asked to see him because the police needed DNA from him for a murder investigation. Thereafter, they went to a location in Hawthorne and found Fifita's father. They told him they need to recover DNA from his son. Deputy Castro's purpose was to stimulate a cell phone conversation between Fifita and others involved in the crimes.

T. August 31, 2016, phone conversation between Fifita and Epraim Lomu (Leka);[10] Fifita admits being involved in the donut shop shooting

In a telephone conversation on August 31, 2016, Leka told Fifita that the police had come to the house and were looking to get his fingerprint or DNA for the donut shop incident. Leka said he told the officers that he did not know him (Fifita). Fifita told Leka to go outside and tell his father, who was talking to the officers, not to reveal the addresses of some people.

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[10] The appellate record does not inform us of Leka's connection to Fifita; we only know that they had these incriminating conversations.

Shortly thereafter, Leka called Fifita and revealed that Fifita's father had already given the police the addresses. Leka said the police wanted to compare Fifita's blood with the blood found at the crime scene. Leka asked, "You didn't [bleed] that night yeah?" Fifita replied, "Nah."

Leka then told Fifita that what the officers were talking about was not blood, but a shirt found at the crime scene. Fifita said he was getting close to Mexico.

Several hours later, Fifita called Leka and asked him if the police had left. They discussed the description of the officers' vehicles in case Fifita were to come across them. Leka said the officers talked to "N-Dog" and left. According to Leka, N-Dog told the officers that Fifita had gotten married and moved out. Leka repeated that the officers wanted Fifita's DNA to see if it matched DNA on a sweater found at the scene. Fifita said the police went to his work place, and one of the managers called him to tell him the police were looking for him. Fifita said he may submit his DNA, but he was hesitant because, according to the store manager, the police found a "shell" related to a murder. Leka asked if there was a "button-up" or T-shirt that was left behind. Fifita said there was but what surprised him was that this was the first time it was brought up.

Fifita began to wonder if someone was talking to the police. Fifita then recounted how the police had met with his wife and showed her a photograph of someone Hispanic named Toni.[11] Fifita asked Leka if he knew "that guy? The Mexican?" Leka, apparently not understanding the question, asked if Fifita was

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[11] Detective Davis testified that Toni was Ventura-Leon.

referring to the person "you guys chased or shot." Fifita clarified, "No, the guy, Toni, who is currently in-custody right now." Fifita said that the police told his wife that the reason they believed Fifita was involved was because of someone in custody whom they called, "Toni," who hung out with the Tongans.

Fifita then revealed that before the shooting, he and others had chased a bald-headed individual riding a bicycle. Fifita, however, was surprised the police knew about the chase of that individual. Fifita said that the person on the bicycle "would not return to meet with" the police.

In wondering whether Toni was the one disclosing facts to the police, Fifita said to Leka, "his vehicle was part of the ones that went." Fifita then recounted how Toni saw Fifita at some event he called "JR's thing" and shortly thereafter, Toni was arrested. The police subsequently went to Fifita's wife, showed her a photograph of Toni, and told her Toni was the reason they knew Fifita had been at the crime scene. In thinking about who told the police, Fifita tried to remember "all the guys that were there that night." And then he remembered that Ventura-Leon was in custody, and thereafter, the police showed his wife Toni's photograph. Fifita complained that although Ventura-Leon was in the picture at Yoshinoya, he should have said, "I don't know them I am a Mexican" and they were "Tongans."

Leka asked if the sweater was part of a ruse by the police. Fifita said that the only thing it could be was a cloth tied to the head of someone named Mote. Fifita could not remember if it was a sweater or a shirt. Fifita said, "They can't find my DNA because I was not wearing anything." Fifita said that if anyone was wearing anything, "it must've been the other guy."

Fifita then revealed that "as soon as the thing was finished, like, we went from there and did another one on the side of LNX." Fifita said, "We arrived, he was wearing something on his head, but when we returned, there was nothing tied to his head, and I remember Mote saying that to me . . . I don't know what he was telling me, like, if it was tied or worn . . . on his head, but as soon as he got out, it does not show it anymore . . . like . . . there is nothing on his head." Fifita later said, "Because at this time, there is nothing they can get on me."

U. Surveillance of Fifita

On September 7, 2016, Los Angeles County Sheriff's Deputy Larry Urruita conducted surveillance at a residence in Hawthorne. Tonga and Fifita were seen at the front porch. Whereas Fifita had been wearing longer hair tied into a bun before, the ponytail was gone that day and his hair had been cut short.

V. September 16, 2016, conversation between Tutu and Lauaki; Lauaki admits being involved in the shooting at the donut shop

On September 16, 2016, during a telephone conversation between Tutu and Lauaki, Tutu said, "[T]hey're telling me, the one you did, the one they talked to you about earlier in the month was the one in the donut shop right?" Lauaki replied, "Yeah Lennox." Tutu said that the police had linked Lauaki to another homicide and that he was the one who had given Toni "the gun." Lauaki said "that's already false" because he was merely caught with the gun, which became the basis for his first offense. He said "the gun is hot . . . probably from that. But you know it was

just me caught with it. And I already did the time and shit for that."

Minutes later, Lauaki said he was only caught on camera at the restaurant and that there was no proof of him being around the shooting. "And they can't just say 'cause of that I did it. And they know for sure that I didn't do it because they came at me like that. Like 'I know damn well you didn't do, didn't do it.'" Lauaki said he did not shoot anyone; if anything, all the police could do was "[m]ake [him] do time for conspiracy of murder, or something like that. Which is like stupid."

W. The October 2, 2016, phone conversation between Ventura-Leon and Conrad Williams (Williams)

On October 2, 2016, Ventura-Leon told Williams that someone in jail was "ratting" and he knew who it was. Williams said that the person, nicknamed "Checkmate," was trying to clear his name by "throwing" Ventura-Leon "under the bus." Ventura-Leon warned, "Everybody outside got to be [careful] now." Ventura-Leon said, "They have us in a tank together, if we uh, if we had some kind of interaction between us, but we were smart enough for all that."

Ventura-Leon concluded by saying, "You know I got to be smarter with these uh, stupid ass phone calls."

X. The phone conversation between Ventura-Leon and Clyde Holani (Holani)

In August or October 2016,[12] Holani, who was Ventura-Leon's sister's boyfriend, spoke to Ventura-Leon on the phone.

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[12] The appellate record is unclear. Detective Bottomley seems to have testified that the conversation occurred in October 2016. The transcript of the conversation is dated August 16, 2016.

Ventura-Leon was in custody at the time. Ventura-Leon said that the police had showed pictures of him and Lauaki at Yoshinoya with three other males. Holani said that the picture did not mean anything. Ventura-Leon recounted how the police had told him that his van was seen following the car whose occupants "shot the bum" and that he was a murderer in the eyes of the law. Holani stated that the police could not pin the blame on him because he was not there. Ventura-Leon said, "No, they have pictures of me at Yoshinoya. [¶] . . . [¶] And my van."

Y. The interview of Fonoifua's mother and sister; Chevrolet sedan connected to Fonoifua

On November 3, 2016, Detective Davis interviewed Olga Lolohea Robledo (Robledo), who identified herself as Fonoifua's sister. Robledo said Fonoifua went by the nickname "Lowco."

Fonoifua's mother was interviewed by the police and she told them Fuahala was shot with Fonoifua on the same day.[13] She also stated that Robledo had a white Chevy Impala.

Fonoifua's girlfriend, Mapu, testified that the silver Chevy Malibu with the license plate number 6ZPU213 belonged to her. That car was in an accident in December 2015 and was totaled.

Z. The December 9, 2016, conversations between Tonga and his girlfriend

On December 9, 2016, Tonga told his girlfriend Tatiana that he may be "going away for probably 9 to 35 years" and asked for her to "come visit" him.

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[13] Fonoifua's mother revealed that Fuahala was a second cousin of Fonoifua.

In a call later that day, Tonga continued telling Tatiana that he was going to be imprisoned for a long time. Tonga admitted, "Aye look I did the crime momma."

AA. Ventura-Leon's cell phone

Ventura-Leon's cell phone was analyzed. "Lowco," previously identified as Fonoifua, was one of his contacts. "Sin," previously identified as Lauaki, was also a contact. Text messages and photographs were downloaded by the police.

One text message exchange was between Ventura-Leon and Fonoifua on January 26, 2016, after the shooting of Ruiz:

"[VENTURA-LEON]: 'Who you let off on?' . . .

"[FONOIFUA]: '[Lennox 13 gang].'

"[VENTURA-LEON]: 'Kill them all. What car you use?'

"[FONOIFUA]: 'My mom[']s.'"

BB. Gang expert testimony

San Luis Obispo Sheriff's Deputy Jonathan Calvert, who used to be a Los Angeles Police Department officer, testified as a gang expert. Deputy Calvert testified that the Scottsdale Piru is a Samoan blood gang that claimed the city of Carson and it rivaled gangs such as the Samoan Crips and the Tongan Crips. Deputy Calvert testified to a murder committed by a Scottsdale Piru gang member. The TCG was primarily a Tongan gang in Inglewood with at least one Black member and a Hispanic member. The gang had about 45 to 50 documented members and claimed the territory enclosed by Hawthorne Avenue, Prairie Avenue, 102nd Street, and 104th Street. The Tongan Crips had an ongoing feud with Lennox 13. Nonetheless, because the Tongan community had deep ties to their church, it would not be unusual for Tonga gang members to attend church located in a

rival gang's territory. The primary activities of the TCG have been murder, attempted murder, possession of firearms, and vehicle theft. Deputy Calvert testified about predicate acts committed by two TCG members, one being attempted murder and the other, murder.

If a gang member were the victim of a crime, typically, he or she would not report it to the police. Instead, the gang "would retaliate, whether by themselves at that time or with their own associates, go back and retaliate against that individual or the gang that that individual is from."

Deputy Calvert explained that gang members went "hunting" for rival gang members. Hunting was an intentional act that could be done alone or as a group. There was generally a specific enemy the gang members looked for, and an understanding among the participants about the scope of their mission. Deputy Calvert testified that he had experienced situations where gang members in one or more vehicles had worked together as a pack to identify an enemy and attack the person as a group.

One common tattoo on these gang members is the number "187" with a Kleenex box, which stands for "kill[ing] Lennox 13."

Ventura-Leon was depicted in pictures throwing Tongan Crips signs. Hawthorne Police Officer Bradley Jackson identified Fifita, Tonga, Lauaki, and Fuahala as members of the TCG.

During a traffic stop on December 23, 2015, involving Tonga and Fuahala, Tonga gave Officer Jackson his phone number. Officer Jackson saw a video stored in that phone depicting Fifita sitting in the rear passenger seat. There was

also a video showing an AK-47. Officer Jackson had seen Fifita, Fuahala, and Tonga at a gang hang-out in Hawthorne.

Officer Jackson testified that Fifita was one of the main members of the TCG. Fifita always tied his hair in the back into a bun or a ponytail. He had tattoos on his eyelids.

Fuahala admitted that he was a TCG member to Officer Jackson. Fuahala had TCG tattoos on his body. In December 2015, Officer Jackson stopped Fuahala and Tonga together in the gold Mercury Marquis.

Detective Bottomley testified that the Lennox 13 gang was a predominantly Hispanic gang in the city of Lennox and the territory it claimed was bordered by Century Boulevard to the north, Imperial Highway to the south, Hawthorne Boulevard to the east, and the 405 Freeway to the west. One of its rivals was TCG.

According to Detective Bottomley, Lennox Park is where the gang often met, and if a rival wanted to seek retaliation against the Lennox 13 gang, it would go to that park to look for Lennox gang members to assault. The donut shop where one of the murders occurred was within Lennox gang territory. The Yoshinoya on Hawthorne Boulevard fell outside Lennox gang territory and was a TCG hangout. Detective Bottomley testified that the area in Gardena where the shooting occurred was claimed by the Lil Watts 13 gang, a Hispanic gang.

Based on a hypothetical reflecting the facts of the shooting near the Tonga church, the shootings at the donut shop, the Lennox Park shootings, the gas station shooting, and the Gardena shooting, Detective Bottomley opined that the crimes

were committed for the benefit of, at the direction of, or in association with a criminal street gang.

CC. Cell site analysis

Federal Bureau of Investigation agent Edwin Nam testified he reviewed cell phone records relating to the cell phones of Tonga, Lauaki, Ventura-Leon, and Fonoifua. Regarding the October 6, 2015, shooting at Lennox Park, the records showed that Fonoifua's cell phone was in the area at the relevant time.

As for the October 17, 2015, shooting at the gas station, Fonoifua and Lauaki's phones were in the area of the crime scene at the relevant time. In fact, Fonoifua's phone was in the area and traveling east at around the same time that the silver car captured in the gas station's video was shown to be traveling east, leaving the crime scene.

Regarding the January 26, 2016, shooting in Gardena, the phones of Ventura-Leon and Fonoifua were in the area of the crime scene.

DD. Additional firearms analysis evidence

The bullet casings found at Lennox Park crime scene, the Gardena crime scene, and outside a Long Beach home where Fonoifua was found with an injury to his hand, were all fired from the same handgun.

II. *Defense Evidence*

A. Fonoifua's evidence

Fonoifua testified he grew up in Inglewood and was of Tongan nationality. He was a TCG member. Fonoifua denied he was part of the shooting at Lennox Park, at the gas station, and in Gardena.

B. Fifita's evidence

Fifita testified he was not at the Yoshinoya restaurant on November 9, 2015, and he was not the person wearing a suit in the video from the restaurant camera. He also was not in the video of the shooting outside the donut shop. Fifita said that he did not know anyone in the Yoshinoya video. He also testified that he did not own a suit and when the police searched his house, they did not find a suit.

Fifita admitted that he had several tattoos. Fifita said he was a TCG member 20 years earlier, but he was no longer part of the gang. He knew some TCG members such as Nick Manako (Manako), Tony Sekona (Sekona), and Timote Tuuholoaki (Tuuholoaki).

Fifita denied that he was in a picture of the group of people from the Yoshinoya restaurant on November 9, 2015. His eyelid tattoo said, "Chec mate," but denied his name was Checkmate. Fifita only knew Ventura-Leon and Lauaki because they were locked up together on this case. He did, however, know Tonga, who is his wife's cousin. Fifita said that Tonga had always ridden a bicycle, rather than driven a car like the Grand Marquis.

C. Lauaki's evidence

Defense investigator Robert Freeman testified that Lauaki claimed possession of a gun that was found in a car even though it was not found on him. He also said that Lauaki's tattoo did not mean that he had killed or assaulted anyone; such tattoos merely reflect disrespect for rival gangs.

III. *The People's Rebuttal*

Officer Jackson testified that Sekona was a TCG member but not Tuuholoaki, and Manako was in custody at the time of the crimes.

DISCUSSION

I. *Fifita and Ventura-Leon's Batson/Wheeler*[14] *Objections*

Fifita and Ventura-Leon contend that the trial court erred in denying the defense's *Batson/Wheeler* objections to the People's peremptory challenge to two African-American female prospective jurors. Lauaki joins in this argument.

A. Relevant proceedings

1. *Prospective Juror No. 9247*

During jury selection, when Ventura-Leon's counsel asked Prospective Juror No. 9247 how she would have to feel to be convinced beyond a reasonable doubt, the juror said, "Be a hundred percent sure." Counsel explained, "[I]t's not beyond all possible doubt." The trial court interjected: "It's not a hundred percent. You don't think of reasonable doubt in terms of percent. [¶] So don't think that way." Prospective Juror No. 9247 responded, "Isn't it how I feel about it, though, or how I . . . " The trial court responded, "You will be given the definition of it, but I am trying to clarify for you it's not a mathematical formula." Ventura-Leon's counsel informed the prospective juror that the standard is that of a "level of sureness that you're comfortable with. You say 'that guy did it. I am convinced he did it, and I feel good about it.'" Prospective Juror No. 9247 indicated that

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[14] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

she understood. Counsel reiterated that it is an "abiding conviction" standard, which is a question whether "something that will stay with you and you won't change your mind about [it] tomorrow and you believe it. If you don't have that, you have to vote not guilty." Prospective Juror No. 9247 indicated that she was "okay" with that.

The prosecution explored the same issue with Prospective Juror No. 9247 later. The following exchange occurred:

"[PROSECUTOR]: You were asked a question by the defense about that standard, and you made a comment about well, is it—you thought it at first was a hundred percent you had to be sure, correct? [¶] Is that fair?

"[PROSPECTIVE JUROR NO. 9247]: I was saying if I was saying guilty or not guilty I had to be a hundred percent.

"[PROSECUTOR]: And that's what I want to get to. [¶] The judge explained beyond a reasonable doubt is not a percentage. I know it's how you feel, that's what I am getting at. It's not a hundred percent, it's not 20 percent, it's not 75. It is a standard that you have an abiding conviction. [¶] So when you say a hundred percent, what does that mean?

"[PROSPECTIVE JUROR NO. 9247]: Like things that are convincing to a hundred percent. That's how I would vote.

"[PROSECUTOR]: And just to go a little bit deeper, a hundred percent would be beyond all doubt, like there is no other way that anything happened; is that fair?

"[PROSPECTIVE JUROR NO. 9247]: That's correct. [¶] . . . [¶]

"[THE COURT]: It is not a percentage. [¶] Do you understand that?

"[PROSPECTIVE JUROR NO. 9247]: Yes, I understand that.

"[PROSECUTOR]: And do you also agree and understand that the case doesn't have to be proved to you beyond all doubt? [¶] Do you understand that as well?

"[PROSPECTIVE JUROR NO. 9247]: Yes.

"[PROSECUTOR]: In life, there is things always open to doubt. As jurors, you're told you are not allowed to speculate. [¶] Does that make sense?

"[PROSPECTIVE JUROR NO. 9247]: Yes.

"[PROSECUTOR]: And what that means is you have to listen to the evidence and as you said very well, Juror No. [9247], you're going to listen to the evidence, and if the evidence convinces you beyond a reasonable doubt you would vote guilty, correct?

"[PROSPECTIVE JUROR NO. 9247]: Yes.

"[PROSECUTOR]: So what you are not allowed to do is speculate and do the what if's, and, 'Oh, I wish I had this piece of evidence, and since I don't I am not convinced.' [¶] Do you understand that differentiation?

"[PROSPECTIVE JUROR NO. 9247]: Yes."

2. *Prospective Juror No. 2947*

Prospective Juror No. 2947, when questioned during voir dire, stated that for 36 years, she had taught high school classes attended by gang members. She knew the Crips and the Bloods "didn't get along." She also "saw a lot of crimes" committed by the Surenos and the MS-13 gang. She had never heard of Tonga gangs, and thought "those must be very low level." She acknowledged that she had "a lot of insight into the gang culture

world." She volunteered the information that she had taught famous gang members, such as Ice Cube and Dr. Dre. She also volunteered that Tookie's[15] grandchildren were her students. She stated, "They were nice to me, no problems. Some of them would say they would be my protector. If I am going to the store they said 'No, don't go to the store. We'll walk with you.' [¶] Some of them [were] my protectors."

The prosecutor asked whether she could return a guilty verdict if the evidence "proves beyond a reasonable doubt that these six individuals committed the murders that they are accused of." She replied, "It depends. [¶] . . . [¶] I am a little—it depends on the situation." The prosecutor then explained the burden of proof, and re-asked the question of whether she could find guilt if the charge was proven beyond a reasonable doubt. Prospective Juror No. 2947 said, "Sure." The prosecutor then asked, "So when you say it depends, you mean on the evidence?" The prospective juror replied, "Yes."

3. *Prosecution excuses Prospective Juror No. 2947; Batson/Wheeler objection*

With one of it peremptory challenges, the prosecution excused Prospective Juror No. 2947. At that point, Tonga's counsel, "on behalf of the defense attorneys," objected on *Wheeler* grounds, with Lauaki, Fifita, and Fuahala joining. Prospective Juror No. 2947 was described as an elderly African-American female who was a retired teacher. Tonga's counsel asked the prosecutor to explain the challenge. The trial court then stated,

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[15] Stanley Williams, or "Tookie," was a well-known Crips gang member. (See *In re Williams* (1994) 7 Cal.4th 572, 586.)

"Based on one juror I don't find a prima facie case. [¶] But do you want to state on the record your reasons?"

The prosecutor stated, "So this particular juror stated that she has worked in a high school for 36 years. She has worked with gang members as youths. She referred to them as . . . her protector. . . . [¶] . . . Whether she is saying the words or not, she is showing an affinity. She has a different view of these gang members, because to call them her protector when they are gang members. [¶] She also stated that she taught gang members and never heard of the Tongan Crips, so they must be low level. [¶] She expressed a lot of already background knowledge of the gangs, and all of the different gangs, and coming in it's just biased because of her own experience."

After Tonga's counsel argued that the juror had indicated she could listen to the evidence, the trial court stated, "Keep in mind this is not a for cause challenge. [¶] . . . [¶] What she is saying is as a reasonable prosecutor she is concerned that this woman would be unduly empathetic to gang members. That's the way I understood it. I am trying to put it in a nutshell."

The prosecutor then stated, "And she did say also, and she kept saying 'it depends' when I asked her if she could convict. I had to keep grilling her on 'depends on what?' I had to explain it multiple times."

The trial court followed with: "But this is a peremptory challenge, and the thing is has the prosecutor articulated a race neutral basis that I would find reasonable and credible. [¶] And what I am saying is that looking at that from her lens, she can find that this woman would be unduly empathetic to gang members. [¶] You know, the more you associate with people the

more you tend to empathize with them. And she certainly had—what was it—30 some years of dealing with gang bangers, some who have gone on to become famous and everything else. [¶] . . . [¶] I am just saying so I am not finding that she would have been able to excuse this juror for cause, and I do find that her explanation was credible. I would be leery of someone who was that empathetic for gang members. [¶] You know, it's like the person that's hanging around with cops all the time and 'Oh, no. I could be fair. I could be fair.'"

After Tonga's counsel made additional arguments, the trial court stated, "That's looking at it through your lens. I am looking at it through the lens of a prosecutor giving me a basis for a peremptory. [¶] I find her credible. I don't think she is running a scam on the court." After more argument from counsel, the trial court added: "She seemed to be very proud, in fact, that they offered to be her protector; that she had gang members go on to be very successful people, which is fine. [¶] But again, from the point of the prosecutor, I think she can exercise a peremptory in good faith and not on a basis of race or any other impermissible basis to say 'I don't want that juror on here.' [¶] So I am going to deny your *Wheeler* motion, okay?"

4. *Prosecution excuses Prospective Juror No. 9247; Batson/Wheeler objection*

Thereafter, Prospective Juror No. 9247 moved to seat 10. After various maneuverings, the prosecutor asked the trial court for permission to challenge for cause a juror seated within the petit venire. The trial court ruled that it was too late.

The prosecutor then challenged Prospective Juror No. 9247. At this point, Lauaki brought a *Batson/Wheeler* motion, arguing

that there was nothing objectionable about this juror other than the fact that she was a Black female. The trial court asked the prosecutor, "Do you want to be heard?" The trial court added, "I don't find a prima facie showing in this case but I will hear you."

At this point, Fonoifua joined in the motion, arguing that the prosecutor often "kicks off the black females" and "get[s] away with it."

The prosecutor then stated the following: "It was either [Lauaki's counsel] or [Ventura-Leon's counsel], I don't remember which, that the standard of proof of beyond a reasonable doubt was being brought to her attention and she said the words 'Well, for me it would have to be a hundred percent.' [¶] And then the standard was explained to her and she made that statement." The trial court then stated, "That's when I broke in and explained it was not a percentage." The prosecutor continued, "When I questioned her again, she said the same thing for me. She said, "For me—for me it's a hundred percent. [¶] I don't care what color you are, anybody that is stating it has to be a hundred percent, that's not following the judge's instructions. That's not the law, and that is grounds for using a peremptory on her."

Lauaki's counsel said that he "didn't hear any of that." The trial court asked, "[y]ou don't recall me explaining . . . that it's not mathematical certainty, it's not percentages. [¶] You don't recall me saying all that?" Lauaki's counsel indicated that he recalled the trial court's words but did not recall that it was "this particular lady." The trial court stated, "Okay. All right. [¶] Your motion is denied."

B. Ventura-Leon forfeited this contention on appeal

Ventura-Leon, at no point, objected or joined in an objection based on *Batson/Wheeler* grounds. As such, his current claim is forfeited. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1048 [failure to timely join a codefendant's motion forfeits appellate review]; *People v. Bolin* (1998) 18 Cal.4th 297, 316 [failure to make a *Wheeler* motion in the trial court forfeits appellate review].)

Claiming that he did not forfeit this argument, Ventura-Leon points out that the *Batson/Wheeler* motions were "joined and vigorously litigated" in the trial court; because the trial court had ample opportunity to resolve this issue, the issue was preserved for appeal. Without deciding this issue, for the sake of completeness, we address his arguments in conjunction with those raised by Fifita.

C. Relevant law

Both the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based solely on group bias, such as race, gender, or ethnicity. (*Batson*, *supra*, 476 U.S. at p. 89; *People v. O'Malley* (2016) 62 Cal.4th 944, 974; *Wheeler*, *supra*, 22 Cal.3d at pp. 276–277.) It is presumed that the prosecutor exercised peremptory challenges in a constitutional manner, and the appellant bears the burden of rebutting that presumption. (*People v. Johnson* (2015) 61 Cal.4th 734, 755; *People v. Manibusan* (2013) 58 Cal.4th 40, 76.)

In determining whether the presumption of constitutionality is overcome, the trial court applies the well-established three-step inquiry set forth in *Batson*. (*People v. Taylor* (2009) 47 Cal.4th 850, 885.) "'First, the trial court must

determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Citation.] The three-step procedure also applies to state constitutional claims. [Citations.]'" (*People v. Taylor*, *supra*, at pp. 885–886; see also *People v. Thomas* (2011) 51 Cal.4th 449, 473.)

"At the third stage of the *Wheeler/Batson* inquiry, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' [Citation.] In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]" (*People v. Lenix* (2008) 44 Cal.4th 602, 613.) The proper focus is on the subjective genuineness of the nondiscriminatory justifications given, not on their objective reasonableness. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.) A "'legitimate reason[]'" for excusing a prospective juror is not a reason that

makes perfect sense, but one that is nondiscriminatory. (*Id*. at p. 916.)

"Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges "'with great restraint.'" [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' [Citation.]" (*People v. Lenix*, *supra*, 44 Cal.4th at pp. 613–614.)

D. Analysis

1. *No step one prima facie showing*

Here, Fifita and Ventura-Leon's claim fails at the outset because the defense failed to make a step one prima facie showing at trial that the prosecutor excused the two prospective jurors based on group bias. (*People v. Scott* (2015) 61 Cal.4th 363, 391 [where trial court determined no prima facie case of discrimination but allowed the prosecutor to state reason for the challenges and thereafter accepted the reasons as genuine, "an appellate court should begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling"].) The trial court here made an express finding after each *Batson/Wheeler* motion was made that each appellant failed to establish a prima facie case of discrimination. The trial court's

express finding of no prima facie case is supported by substantial evidence.

In reviewing whether a prima facie was established at the time the motion was made, our California Court Supreme has observed that certain types of evidence may prove particularly relevant. (*People v. Scott*, *supra*, 61 Cal.4th at p. 384.) Among these are that the prosecutor: (1) "has struck most or all of the members of the identified group from the venire"; (2) "has used a disproportionate number of strikes against the group"; (3) "has failed to engage these jurors in more than desultory voir dire"; (4) that the defendant is a member of the identified group; and (5) that the victim is a member of the group to which the majority of the remaining jurors belong. (*Ibid.*) The reviewing court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and "clearly established" in the record (*People v. Box* (2000) 23 Cal.4th 1153, 1189, disapproved in part on other grounds in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10) and that necessarily dispel any inference of bias (*People v. Taylor* (2010) 48 Cal.4th 574, 644).

Here, Fifita and Ventura-Leon have not sustained their burden of showing a prima facie case of discrimination. They failed to demonstrate on the record how many African-American prospective jurors remained on the panel at all times and how many African-American prospective jurors remained in the jury pool.[16] (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1105, fn. 3,

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[16] We agree with Fifita that he was not *required* to show how many African-American prospective jurors remained on the panel and how many remained in the jury pool; as he points out, this

overruled in part on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 ["the defendant carries the sole burden to establish an inference of discrimination"].) Moreover, the prosecutor's voir dire of the excused prospective jurors was thorough and appropriate, as previously set forth. Furthermore, Fifita and Ventura-Leon did not belong in the identified minority groups (African-American and females) subject to the alleged discrimination.[17] Nor was there any showing that the victims in this case were members of a group to which the majority of the jury belonged. Because defense counsel failed to make a step one prima facie showing of group bias, each *Batson/Wheeler* motion was properly denied.

2. *Prosecutor provided race-neutral reasons*

In addition, the trial court properly denied the *Batson/Wheeler* motions because the prosecutor provided inherently plausible, race-neutral reasons for exercising the peremptory challenges, and those reasons are amply supported by the record.

a. Prospective Juror No. 2947

Regarding Prospective Juror No. 2947, the prosecutor pointed out that she showed affinity to gang members, having made comments that some members were her "protectors." Under such circumstances, a reasonable prosecutor would be

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showing would have been helpful in proving a prima facie case of discrimination.

[17] We do not hold that a defendant *must* belong to the identified minority group to raise the objection. We simply recognize that this factor may weigh into the analysis.

concerned that such a juror, having received benefits from gang members, and expressed pride in having taught famous gang members, would be too sympathetic to them. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 191 [that prospective juror might be sympathetic to defendant because of his high school familiarity with Blood gang members warranted peremptory challenge].)

The prosecutor's second concern was Prospective Juror No. 2947's ability to fairly evaluate the evidence based on her experience. As an example, the prosecutor noted Prospective Juror No. 2947's dismissal of the Tongan Crips as "low level" because she had not heard of them. Such a concern was valid. (See, e.g., *In re Malone* (1996) 12 Cal.4th 935, 963 [jurors should not draw conclusions about the evidence based on own expertise or specialized knowledge].)

Finally, the prosecutor was justifiably concerned about Prospective Juror No. 2947 because she had exhibited reservations about returning guilty verdicts even if the six defendants were proven beyond a reasonable doubt to have committed the charged acts. After all, when asked if she could convict when the crime was proven beyond a reasonable doubt, Prospective Juror No. 2947 answered, "I am a little—it depends on the situation." Even though the prosecutor later, through leading questions, got her to answer "yes," to the question of "So when you say it depends, you mean on the evidence," the prosecutor was entitled to distrust such a reassurance. This was a proper race-neutral reason for a peremptory challenge. (See *People v. Manibusan*, *supra*, 58 Cal.4th at p. 84 ["The prosecution could have been concerned about [the prospective juror's answer]

notwithstanding [her] subsequent acknowledgement during voir dire that she would follow the reasonable doubt standard and would not require anything greater of the prosecution"].)

In light of the various race-neutral reasons given by the prosecutor that are substantially supported by the record, as the trial court found after a sincere evaluation of her argument, the prosecutor's peremptory challenge to Prospective Juror No. 2947 was not motivated by discriminatory intent.

b. Prospective Juror No. 9247

Similarly, the prosecutor's challenge to Prospective Juror No. 9247 was proper. The prosecutor's stated reason was that the juror had indicated she needed to be "a hundred percent" before she finds guilt and restated that feeling again even after being informed of the standard. This was clearly a valid race-neutral reason to challenge a prospective juror. (See *People v. Mai* (2013) 57 Cal.4th 986, 1053 [reasonable for prosecutor to be concerned that juror would insist on removal of all doubt].) The record amply supported the prosecutor's concern. The juror initially told Ventura-Leon's counsel that she needed to be "a hundred percent sure" to convict. Even after the trial court explained that that is not the standard and asked her to not "think that way," she responded, "Isn't it how I feel about it, though . . . ." Thus, the record showed that the prosecutor's description was accurate, i.e., that this prospective juror restated the same feeling even after being told that her initial impression was incorrect.

Indeed, after much guidance was given by the trial court and counsel, it remained unclear whether she understood the proper standard. For example, when the prosecutor followed up

with her, the prosecutor asked, "So when you say a hundred percent, what does that mean," her reply was less than convincing, not only describing what she meant, i.e., "Like things that are convincing to a hundred percent" but also adding, "That's how I would vote." While subsequent clarifications of the standard by the prosecutor were met with the prospective juror's affirmation on her ability to follow the law, the prosecutor was not required to accept her reassurances. (See *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1011 [upholding challenge when, despite the prospective juror's "contrary assurances, the prosecutor had reason for her expressed skepticism that he would be fair to the People"]; *People v. Jordan* (2006) 146 Cal.App.4th 232, 257 ["prosecutor was not required to believe [the prospective juror's] assertion that she could set aside her feelings about the Oakland Police Department"].)

In fact, "adequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias and not simply as 'a mask for racial prejudice.'" (*People v. Williams*, *supra*, 16 Cal.4th at p. 664.)

Notably, the prosecutor attempted to excuse Prospective Juror No. 9247 for cause. The trial court disallowed her request because it was too late. But, her effort to do so demonstrates that the prosecutor genuinely believed that the prospective juror was unable to shed her initial inclination to require 100 percent certainty before she could convict.

It follows that, as the trial court found, the prosecutor offered a race-neutral reason for excusing Prospective Juror No. 9247.

3. *Comparative analysis*

For the first time on appeal, Ventura-Leon contends that comparative analysis shows the prosecutor gave pretextual reasons for the removal of the two prospective jurors.[18]

"Comparative juror analysis is evidence that, while subject to inherent limitations, must be considered when reviewing claims of error at [*Batson/Wheeler*]'s third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons. In those circumstances, comparative juror analysis must be performed on appeal even when such an analysis was not conducted below." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 607.)

"[C]omparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 622.) As noted, "comparative juror analysis on a cold appellate record has inherent limitations," among them that "the prosecutor is never given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers." (*Id.* at pp. 622–623.)

In the instant case, the record is insufficient for us to conduct such analysis. The trial court did not find a prima facie case, and therefore, the explanations the prosecutor gave were fairly limited in terms of detail or scope and were not subjected to any significant analysis. Similarly, the prosecutor, with a

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[18] Fifita seemingly joins in this argument in his reply brief.

favorable ruling on whether a prima facie case had been made, had no occasion to explain or justify her reasons or to distinguish the excused prospective jurors from any seated juror. Under these circumstances, it would not be fair or fruitful to subject the prosecutor's reasons to comparative analysis. At the very least, we "'must keep in mind that exploring the question at trial might have shown that the jurors were not really comparable. Accordingly, we consider such evidence in light of the deference due to the trial court's ultimate finding of no discriminatory purpose.'" (*People v. Hardy* (2018) 5 Cal.5th 56, 77.)

In any event, comparative analysis does not help appellants here. Ventura-Leon focuses such an analysis on one individual, Prospective Juror No. 5154,[19] who was also a teacher who had taught gang members. Ventura-Leon argues that the prosecutor's acceptance of the panel prior to this prospective juror's excusal by one of the defense attorneys shows that the explanation for the excusal of Prospective Juror No. 2947 was pretextual.

Ventura-Leon's comparison of the two jurors is flawed. While both prospective jurors taught gang members, Prospective Juror No. 5154 never spoke of gang members as protectors. Prospective Juror No. 5154 did not express pride in having taught famous gang members. Nor had Prospective Juror No. 5154 characterized the Tongan Crips as an insignificant gang just because he or she had never heard of the gang. And, Prospective Juror No. 5154 did not express the hesitation about

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[19] As Ventura-Leon points out, we do not know if Prospective Juror No. 5154 was female or African-American.

convicting if evidence proved guilt beyond a reasonable doubt. As such, while there was a superficial similarity between the prospective jurors in question, they were not material as a whole.

Moreover, our Supreme Court has recognized "'that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge'; that 'the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box'; and that 'the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the peremptory challenge and the number of challenges remaining with the other side.' [Citation.] 'It is therefore with good reason that we and the United States Supreme Court give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose.' [Citation.]" (*People v. Chism* (2014) 58 Cal.4th 1266, 1318.)

In sum, substantial evidence supports the trial court's express and implied finding that the prosecutor's proffered reasons were not pretextual and that there was no discrimination. Ventura-Leon's reliance on comparative juror analysis does not undermine this conclusion.

II. *Denial of Fonoifua's Motion to Sever*

Lauaki argues that the trial court erred in denying Fonoifua's motion to sever counts 2, 3, 4, 7, and 9. Fifita and Ventura-Leon join in this claim.

A. Relevant proceedings

On April 5, 2018, Fonoifua filed a motion for severance of all the charges pertaining to him from the other charges. He argued that the only count he shared with another defendant was count 4, in which the evidence against Lauaki was weak. He asserted that the evidence would show all six defendants were TCG members and to try all the counts together "would make it more [believable] that he participated in the ones he is actually charged with."

At the time the motion was filed, the second amended information had yet to be filed. In the original information, Fonoifua was charged with six counts, i.e., counts 1, 2, 3, 4, 7, and 9. In the second and third amended informations,[20] Fonoifua was charged with five counts, being left off of count 1. Fonoifua was the only defendant named in counts 2, 3, 7, and 9. He shared the charge in count 4 with Lauaki.

On July 6, 2018, the motion was heard. None of the other defendants joined. Fonoifua's counsel argued that as to the count that he shared with Lauaki, there was weak evidence against Lauaki. Counsel also argued that being tried with the rest of the defendants would link him, by virtue of their membership in the same gang, with murders that he "ha[d] nothing to do with." The prosecutor noted that the evidence of guilt as to all the defendants was intertwined. The murders occurred within the short span of time, i.e., between October 2015 and January of 2016. And, Fonoifua was implicated in the murders during Ventura-Leon's phone conversation.

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[20] The first amended information was lodged but not filed.

Moreover, in the Lennox Park murder for which Fonoifua was charged, Fuahala was identified as a cosuspect in that case. This showed a common link between Fonoifua and the coconspirators. The prosecutor further noted Lauaki was charged in count 4 as was Fonoifua. The prosecutor argued that the cell phone records show that Lauaki was with Fonoifua from the morning hours all the way through nighttime, although his phone was turned off during the Salcedo murder. The prosecutor asserted that there was cross-admissible evidence that was not inflammatory. The crimes charged were murder and so no one crime was more inflammatory than another. The prosecutor noted no *Aranda/Bruton*[21] problems. The prosecutor concluded that it was in the interest of justice and time for there to be a joint trial and Fonoifua would not be prejudiced.

The trial court denied the motion.

B. Forfeiture

As pointed out by the People, none of the appellants joined Fonoifua's motion to sever. As such, they have forfeited their argument on appeal. (*People v. Wilson* (2008) 44 Cal.4th 758, 793 [failure to join in a motion by a codefendant generally waives the issue on appeal]; *People v. Smith* (2001) 24 Cal.4th 849, 852 ["As

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[21] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123. "Under the so-called *Aranda/Bruton* doctrine, a trial court may generally not allow a jury in a joint criminal trial of a defendant and codefendant to hear the unredacted confession of the codefendant that also directly implicates the defendant—even if the jury is instructed not to consider the confession as evidence against the defendant." (*People v. Washington* (2017) 15 Cal.App.5th 19, 23.)

a general rule, only 'claims properly raised and preserved by the parties are reviewable on appeal'"].)

Lauaki asserts that any joinder in Fonoifua's motion would have been futile. We do not make any determination as to futility. Instead, in the interests of justice, we turn to the merits of appellants' argument.[22]

C. Legal principles

"Section 1098 expresses a legislative preference for joint trials." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40.) The statute provides: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant; provided, that where two or more persons can be jointly tried, the fact that separate accusatory pleadings were filed shall not prevent their joint trial." (§ 1098; see also § 954 [setting forth the procedures governing charging more than one count or offense].)

Generally, four factors are considered when determining whether the trial court abused its discretion in denying a motion for severance: "'(1) whether evidence of the crimes to be jointly tried is cross-admissible; (2) whether some charges are unusually

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[22] Because we reach the substance of Lauaki's argument, and find it has no merit, Lauaki was not denied effective assistance of counsel.

likely to inflame the jury against the defendant; (3) whether a weak case has been joined with a stronger case so that the spillover effect of aggregate evidence might alter the outcome of some or all of the charges; and (4) whether any charge carries the death penalty or the joinder of charges converts the matter into a capital case.' [Citation.] 'We then balance the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state.' [Citation.] However, '[i]f the evidence underlying the joined charges would have been cross-admissible at hypothetical separate trials, "that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." [Citations.]' [Citation.]" (*People v. Westerfield* (2019) 6 Cal.5th 632, 689.)

A denial of a severance motion is reviewed "for abuse of discretion, based on the facts as they appeared at the time of the court's ruling." (*People v. Winbush* (2017) 2 Cal.5th 402, 456.) "'[R]eversal is required only if it is reasonably probable the defendant would have obtained a more favorable result at a separate trial.' [Citations.]" (*People v. Souza* (2012) 54 Cal.4th 90, 109.) "'If the court's joinder ruling was proper when it was made, however, we may reverse a judgment only on a showing that joinder "'resulted in "gross unfairness" amounting to a denial of due process."'" [Citations.]" (*Ibid*.)

D. Analysis

Applying these legal principles, the trial court's ruling was proper when it was made.[23]

1. *Cross-admissible evidence*

Because Lauaki and Fonoifua were jointly charged for the murder of Salcedo outside the gas station, the set of evidence for that crime was cross-admissible. Another set of evidence that was cross-admissible was that of the shooting of Ruiz in Gardena. Both Ventura-Leon's phone and Fonoifua's phone were in the area of the shooting around the time of the crime. As such, Fonoifua is shown by the evidence to be involved in at least two of the crimes charged against other defendants. Due to such cross-admissibility of evidence, joinder of the defendants was entirely proper.

Moreover, at the time the motion to sever was brought, which is the operative time for the current analysis, Fonoifua was still charged in count 1 with conspiracy to commit murder along with the other defendants. That charge, having been through the crucible of a preliminary hearing, not only yields another charge for which evidence was cross-admissible as to all defendants, it effectively linked Fonoifua to all the crimes charged in this case. Indeed, at the time the severance motion was argued, the conspiracy charge against Fonoifua was a big part of the prosecutor's argument against severance. (*People v. Hardy* (1992) 2 Cal.4th 86, 170 [conspiracy charge provides basis for

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[23] It follows that Lauaki's and Fifita's counsel's failure to join in Fonoifua's motion to sever did not amount to ineffective assistance of counsel.

cross-admissibility of evidence]; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 432 [same].)

Indeed, despite the eventual deletion of count 1 as to Fonoifua, the prosecution's theory remained unchanged at trial that all of the defendants, including Fonoifua, were TCG members hunting victims pursuant to a "pack mentality." The precipitating event for this crime spree was apparently a four-month old incident during which Fonoifua himself, as well as Fuahala, suffered multiple gunshot wounds from an attack by rival gang members. Fonoifua's charged crimes, therefore, were part of a whole series of collaborative gang-style assaults by TCG members against their rivals.

Importantly, in none of the shootings did Fonoifua act alone. As for the Lennox Park killing, for which Fonoifua was the only charged defendant, the evidence clearly showed the involvement of two cars and two other gunmen in the shooting. As for the shooting of Salcedo at a gas station, Fonoifua was one of two gunmen. As for the shooting of Ruiz in Gardena, for which Fonoifua was charged as the only defendant, he was the shooter but had arrived in the area in a car as the passenger. It was only due to prosecutorial discretion that no other defendants were charged in counts 2, 3, and 7.

Further demonstrating the existence of an uncharged gang conspiracy between Fonoifua and the rest of the defendants is evidence of Ventura-Leon's gestures to Fonoifua instructing him not to talk while at the jail cell.

Given that Fonoifua's crimes were part and parcel of this concerted four-month crime-spree by TCG members in retaliation for a gang-style assault on Fonoifua and Fuahala, much, if not

all, of the evidence relating to Fonoifua's charged crimes was cross-admissible as to the other defendants, including as motive evidence as well as evidence of a common plan. To join Fonoifua to the rest of the defendants in this case was not only warranted, but the most natural and compelling way to view the set of crimes charged in this case.

2. *Unlikely to inflame the jury*

All of the charges that mattered in this case, attempted murder and murder, were equally serious and equally appalling. As such, no single one of these charges serve to inflame another.

3. *Weak case not joined with strong case*

Moreover, this was not a situation where a weak case was joined to a stronger case. The case against appellants was strong. There was ample evidence that on November 9, 2015, after the attempted murder of Coburn and before the donut shop shooting, appellants and other defendants met at the Yoshinoya restaurant, and thereafter, the six criminals set out in pursuit of Gonzalez, culminating in the murder of Campos outside the donut shop. The shooting of Coburn and the donut shop shooting were connected because they both involve the same nine-millimeter gun. Such evidence convincingly established a conspiracy involving at least the appellants in this case.

Other evidence showed the guilt of each appellant. Regarding Ventura-Leon, one of the murder weapons used during the Salcedo shooting was found hidden in a toilet in Ventura-Leon's home. He admittedly drove the Plymouth van, with the distinctive missing quarter panel, that was present at the Redfern shooting, at the donut shop shooting, and at the Yoshinoya restaurant meeting. Young, the surviving victim,

placed Ventura-Leon at the scene of the donut shop shooting. Ventura-Leon was also linked to the Redfern Avenue location by his cell phone, which was in the area when the crime occurred.

As for Fifita, video footage showed that he and Fuahala were the gunmen at the donut shop. Fifita essentially admitted guilt as to that shooting during his recorded telephone conversation with Leka by saying that he did not bleed that night and hence did not leave DNA at the scene. He then exhibited more consciousness of guilt by saying that he did not want to give a DNA sample because the police found gun casings that day. Fifita also admitted that a shirt could have been left behind at the crime scene.

During that same conversation, Fifita revealed that he was chasing a "Mexican" before the shooting and blamed Ventura-Leon for talking to the police.

Finally, Fifita admitted that the same night, as soon as he committed a shooting, he and others "did another one on the side of LNX."

Regarding Lauaki, he was found with the .45 caliber Taurus pistol that was used in the Salcedo murder. While Lauaki claimed he was not the actual shooter at the donut shop, he admitted that he was involved in it, tacitly admitting that was one of the murders "[h]e did." Indeed, shortly before the Marquis and the van began chasing Gonzalez, he and others were standing outside Yoshinoya talking. And, Lauaki exhibited consciousness of guilt when he said in a phone conversation that the police had no proof against him except conspiracy to commit murder.

In sum, because the case against each appellant was strong, the joinder did not result in combining a strong case with a weak one.

4. *Not a capital case*

Finally, this case was not charged as a capital case.

5. *Trial court properly denied Fonoifua's severance motion*

Because the factors favor joinder in this case, the trial court did not abuse its discretion in denying Fonoifua's severance motion.[24] Nor is there any reasonable probability appellants would have obtained a more favorable result at a separate trial. (*People v. Ortiz* (1978) 22 Cal.3d 48, 46.) As set forth above, there was overwhelming evidence of appellants' guilt. As such, appellants cannot demonstrate that there was a reasonable probability that had Fonoifua's case been severed, the jury would have rendered them a more favorable verdict.

III. *Juror No. 5's Concerns About Threats and Intimidation*

Fifita contends that the trial court erred in not conducting additional investigations in response to Juror No. 5's report that he was intimidated by a particular defendant[25] in this case. Ventura-Leon and Lauaki join in this argument.

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[24] Given that count 4 was charged against both Lauaki and Fonoifua, evidence of the murder of Salcedo necessarily would have been admissible against Lauaki even if Fonoifua's case had been severed.

[25] According to Fifita's appellate briefs, Juror No. 5 identified Fifita as the threatening defendant.

A. Relevant proceedings

On September 10, 2018, during the middle of trial, Juror No. 5 wrote a letter to the trial judge, expressing "paranoia and fear" stemming from concerns that one defendant was staring at him. According to Juror No. 5, the juror who sat behind him also noticed the alleged behavior. Juror No. 5 stated that he was having "a difficult time concentrating on the witness testimonies." He indicated that his fear affected his ability to decide this case rationally, and he asked to be removed from the jury.

The trial court discussed the matter with the parties. Ventura-Leon's counsel said that defense attorneys were willing to stipulate to Juror No. 5 being excused, but requested that the trial court question him regarding which juror was behind him. The prosecutor was not willing to stipulate to excusing Juror No. 5. The trial court then called Juror No. 5 to question him.

First, the trial court asked him which juror had noticed the "same thing." Juror No. 5 pointed to Juror No. 10's seat. According to Juror No. 5, when he asked if he noticed what he was talking about, Juror No. 10 said he noticed "people were looking over more on our side."

The trial court then inquired whether Juror No. 5 saw obvious threatening behavior directed at him. Juror No. 5 said, "No, maybe it's just me being more paranoid or something in that sense." Juror No. 5 said he spoke only to Juror No. 10 about it.

After Juror No. 5 repeatedly expressed nervousness and fear about serving on the jury and indicated that the feeling could push him in one direction more than another, the parties stipulated to his excusal.

Thereafter, counsel for Fifita asked for an inquiry with Juror No. 10. The trial court and the parties discussed what to ask of Juror No. 10. Counsel for Ventura-Leon suggested asking him whether Juror No. 5 spoke to him about a problem with a defendant. When Juror No. 10 was called in, the trial court asked, "Do you recall Juror No. 5, he would have been the juror sitting immediately in front of you there, talking to you about anything happening in the courtroom?" Juror No. 10 said, "I don't remember." The trial court then asked whether there was anything in the courtroom that would cause any concern for any jurors. Juror No. 10 responded, "Not that I know of." The juror then indicated the jurors could be fair to both sides.

When the trial court asked the parties if they had any further questions, everyone indicated in the negative.

A few minutes later, to make sure that Juror No. 5 was not referring to another juror seated behind him, the trial court granted Fuahala's counsel's request to question Juror No. 11. The trial court asked whether the juror had any concerns during the course of the trial. Juror No. 11 answered in the negative. The trial court then asked if Juror No. 11 "had any conversations with Juror No. 5 about anything that Juror No. 5 might have been concerned about." The juror responded in the negative. After all counsel stated they had no questions, the juror exited the courtroom.

None of the defense attorneys asked for additional remedies.

B. Forfeiture

As pointed out by the People, Fifita and Ventura-Leon did not raise this objection below. It follows that they have forfeited

any such claim on appeal. (*People v. Boyette* (2002) 29 Cal.4th 381, 430 ["When the trial court proposed its decision not to respond to the juror's note, however, defendant did not object. He thus failed to preserve the issue for appeal and, indeed, may be held to have given tacit approval of the trial court's decision"]; *People v. Russell* (2010) 50 Cal.4th 1228, 1250 ["defendant's claim that the court's questions of Juror No. 8" were improper "is forfeited because defendant failed to object"].)

For the sake of completeness, we turn to the merits of Fifita and Ventura-Leon's argument.

C. Relevant law

Criminal defendants have a constitutional right to a trial by an impartial jury. (U.S. Const., amends. VI and XIV; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *People v. Nesler* (1997) 16 Cal.4th 561, 578.) "An impartial jury is one in which no member has been improperly influenced [citations] and every member "'is capable and willing to decide the case solely on the evidence before it'" [citations]." (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) A trial court may discharge a juror and replace him or her with an alternate if the trial court finds that the juror is "unable to perform his or her duty." (§ 1089.) "A sitting juror's actual bias," for example, "which would have supported a challenge for cause, renders him 'unable to perform his duty' and thus subject to discharge and substitution." (*People v. Keenan* (1988) 46 Cal.3d 478, 532.)

"Once a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty 'to make whatever inquiry is reasonably necessary' to determine whether the juror should be discharged." (*People v. Espinoza* (1992) 3

Cal.4th 806, 821.) "[N]ot every incident involving a juror's conduct requires or warrants further investigation." (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.) "'As our cases make clear, a hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his [or her] duties and would justify his [or her] removal from the case. [Citation.]' [Citation.]" (*People v. Cleveland*, *supra*, at p. 478.) "The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court." (*People v. Ray* (1996) 13 Cal.4th 313, 343.)

D. Analysis

Applying these legal principles, the trial court did not abuse its discretion in how it addressed Juror No. 5's note. After receiving it, the trial court immediately conducted a hearing and questioned Juror No. 5. When faced with answers from that juror that indicated strong concerns that he could not be fair, the court excused that juror, with the parties' stipulation.

During the inquiry, the trial court was also advised that Juror No. 5 spoke to no one other than a juror that sat behind him. Thus, the trial court, in consultation with the parties, proceeded to question both jurors that could have been sitting behind Juror No. 5 and satisfied itself that neither of them found anything concerning about the trial that could affect their impartiality.

The trial court, having skillfully and carefully elicited information regarding a potential source for partiality and having ascertained that the potential partiality had not spread to others

on the jury panel, cannot be said to have abused its discretion in concluding its inquiry at that point. Indeed, none of the defense attorneys at the time felt it necessary to engage in a further inquiry.

Fifita suggests that the trial court should have done something more, such as question all of the other jurors about what Juror No. 5 reported. We disagree. The trial court could reasonably have believed that questioning other jurors risked injecting bias into their minds where there was none before. Taking such a risk based on speculation, unsupported by the record, that one of the defendants had improperly tried to exert influence on any juror other than Juror No. 5, would have been unwarranted. In fact, even Juror No. 5 acknowledged that his perception of intimidation could have been the result of him just being paranoid.

Given that there was nothing substantial to warrant additional disruption of the proceedings or to further risk tainting the jury, the trial court acted properly in concluding its inquiry the way it did.

IV. *Sufficient Evidence Supports the Conspiracy Charge*

Fifita and Lauaki contend that there was insufficient evidence to support the charge of conspiracy to commit murder. Ventura-Leon joins in this argument.

A. Relevant law

To assess a claim of insufficient evidence, "'we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is

reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]'" (*People v. Manibusan*, *supra*, 58 Cal.4th at p. 87.)

"'In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]"'" (*People v. Manibusan*, *supra*, 58 Cal.4th at p. 87.) We do not resolve credibility issues or evidentiary conflicts, but instead look for substantial evidence. (*Ibid*.)

Reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the verdict. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 331; accord, *People v. Manibusan*, *supra*, 58 Cal.4th at p. 87.)

These same standards apply when a conviction is based primarily on circumstantial evidence. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; *People v. Valdez* (2004) 32 Cal.4th 73, 104.)

"A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy." (*People v. Morante*

(1999) 20 Cal.4th 403, 416; accord, *People v. Jurado* (2006) 38 Cal.4th 72, 120–121 [conspiracy to commit murder].)

"'One who conspires with others to commit a felony is guilty as a principal. (§ 31.) "'Each member of the conspiracy is liable for the acts of any of the others in carrying out the *common* purpose, i.e., all acts within the reasonable and probable consequences of the common unlawful design.' [Citations.]" [Citation.]'" (*People v. Maciel* (2013) 57 Cal.4th 482, 515.)

"Evidence is sufficient to prove a conspiracy to commit a crime 'if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citations.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135; accord, *People v. Maciel*, *supra*, 57 Cal.4th at pp. 515–516; see also *People v. Homick* (2012) 55 Cal.4th 816, 870 [element of agreeing to commit a crime "must often be proved circumstantially"].)

B. Analysis

Applying these legal principles, ample evidence supports the conspiracy charge against appellants. Appellants and codefendants Fonoifua, Fuahala, and Tonga were all members of the TCG. They were a close-knit group, often gathering socially; some were even related to each other. It was part of gang culture, including TCG's culture, to go on "mission[s]" of violent crimes against rival gangs in their territories. Under that same culture, gang members who were victimized by rival gangs will seek to retaliate in kind.

Fuahala and Fonoifua were shot and injured by rival gang members. Months after, Fonoifua, along with individuals that came in two cars, including an SUV-type truck that fit the description of Ventura-Leon's car, committed the brutal killing of Gomez and the attempted murder of Godines, who associated with the Lennox 13 gang. Eleven days later, Fonoifua and another TCG member, possibly Lauaki, ambushed and killed a rival gang member, Salcedo, from the Scottsdale Piru gang outside a gas station.

Weeks later, a rival gang, ostensibly Lennox 13, sent a threatening message to the TCG by sending a gang member on a bicycle to a Tongan church in the heart of Lennox 13 territory and brandishing a firearm at church members. It would not be unusual for TCG members to be at that Tongan church. The very next day, Coburn was shot inside Lennox 13 territory by occupants who rode in two vehicles: (1) the Marquis in which the police had later detained Fuahala and Tonga, and (2) Ventura-Leon's van, in which the police later detained Ventura-Leon, Lauaki, and another TCG member. And, cell phone evidence placed Ventura-Leon and Tonga in the area at the time of the crime.

Two hours later, the same two vehicles appeared at a TCG hang out—the Yoshinoya restaurant—and all three appellants, plus Fuahala and Tonga, exited the vehicles, entered the restaurant, remained in there for about 15 minutes. All of them thereafter convened in the parking lot.

At that time, they spotted Gonzalez, and both vehicles left the parking lot in pursuit. Fifita admitted that he was in that pursuit, trying to chase a "Mexican." After Gonzalez escaped,

video evidence from Lennox Academy showed that the group inside the two vehicles turned their attention to Campos and his wife.

At the donut shop, Fifita and another TCG member killed Campos in cold blood and almost killed his wife. The shooting was captured by surveillance video from a shop in the plaza and Fifita made confessions in telephone calls. The surviving victim, Young, identified Ventura-Leon and Tonga as being involved, whether as the shooters or being at the scene. Tonga admitted in a telephone conversation that he "did the crime." Lauaki admitted in a telephone conversation that he was involved in that incident. Lauaki also admitted that the police if anything could "[m]ake [him] do time" for "conspiracy of murder" but not for actually shooting anyone.

Meanwhile, firearms analysis showed that the gun used at the Redfern Avenue shooting (where Coburn was shot) was one of the guns used at the donut shop shooting.

And, at a traffic stop, Lauaki admitted that he was the one who possessed a .45 Taurus pistol, which forensics showed to be one of the guns used during the murder of Salcedo at the gas station.

Taken together, this is substantial evidence supporting the jury's verdict that appellants conspired to murder the victims in this case. The evidence amply shows that appellants entered into an agreement to go after those who they suspected to be members of rival Hispanic gangs and took acts in furtherance of that agreement.

Urging us to reverse, appellants argue that the prosecution's case improperly rested on the theory of guilt by

gang association, not actual evidence. We disagree. As set forth above, there is ample evidence of individual guilt. To the extent appellants implicitly ask us to reweigh the evidence in their favor, we cannot, and will not, do so. (*People v. Prunty* (2015) 62 Cal.4th 59, 89 (Conc. & dis. opn. of Cantil-Sakauye, C. J.); *People v. Alexander* (2010) 49 Cal.4th 846, 882–883.)

V. *CALCRIM No. 315*

Using CALCRIM No. 315, the trial court instructed the jury on various questions to consider in evaluating an eyewitness identification of a defendant. Among these questions was, "How certain was the witness when he or she made an identification?" Appellants contend that the trial court erred by including this question. They argue that consideration of an eyewitness's certainty has no scientific basis, and the jury instruction allowing it to be considered violated their right to due process of law.

Our Supreme Court has held: "Studies concluding there is, at best, a weak correlation between witness certainty and accuracy are nothing new. We cited some of them three decades ago to support our holding that the trial court has discretion to admit expert testimony regarding the reliability of eyewitness identification. [Citation.] In *People v. Wright* (1988) 45 Cal.3d 1126, 1141, we held 'that a proper instruction on eyewitness identification factors should focus the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence.' We specifically approved CALJIC No. 2.92 [the predecessor to CALCRIM No. 315], including its certainty factor. [Citation.] We have since

reiterated the propriety of including this factor. [Citation.]" (*People v. Sánchez* (2016) 63 Cal.4th 411, 462.)

As appellants note, our Supreme Court is now considering whether the certainty factor as articulated in CALCRIM No. 315 remains valid. (See *People v. Lemcke*, review granted Oct. 10, 2018, S250108.) In the meantime, *People v. Sánchez*, *supra*, 63 Cal.4th 411 remains good law. Unless and until the Supreme Court changes that law, we are bound by it holding that including the certainty factor in instructions on eyewitness identification is not error. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) The fact that some case authorities have been "called into question" is not grounds for us to disregard *People v. Sánchez*, *supra*, 63 Cal.4th 411.

"Moreover, the eyewitness identifications were far from the only evidence connecting [appellants] to the crimes." (*People v. Sánchez*, *supra*, 63 Cal.4th at p. 462.) As set forth above, there was ample evidence apart from eyewitness testimony (surveillance video, gun casings) linking appellants to these crimes.

VI. *Fifita's Request for Self-representation*

Fifita contends that his sentence should be reversed because the trial court improperly denied his request for self-representation at sentencing.

A. Relevant proceedings

The jury pronounced its verdict on September 27, 2018. The parties, including Fifita himself, agreed to waive time and continue the matter to November 30, 2018, for sentencing.

On November 30, 2018, Fifita's trial counsel indicated that there was no cause why the judgment should not be pronounced

and that he did not wish to be heard. Fifita said that he wanted to be heard and wanted to exercise his *Faretta*[26] rights. The trial court asked if Fifita was ready to proceed to sentencing. Fifita responded that he needed more time and told the trial court that he did not have a fair and impartial trial. The trial court commented that his conviction had been rendered "sometime ago" and that he had had plenty of time to prepare if he wanted to represent himself. Fifita responded, "This man [referring to defense counsel] didn't do anything he said he was going to do, none of it. No arguments, no rebuttal, none of it." The trial court denied Fifita's motion as untimely, noting that he was not prepared.

Fifita then complained that he wanted to make an application for "newly discovered evidence." When asked what the new evidence was, he said "[t]his man should know about it" and said that his request was actually a *Brady*[27] and *Trombetta*[28] motion. Fifita explained that the new evidence was that the "alleged victim[s]" had all types of narcotics in their possession, and that evidence was left out of trial. The trial court questioned the relevance of this purported new evidence, and Fifita replied that it made the witness "un-credible."

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[26] *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

[27] *Brady v. Maryland* (1963) 373 U.S. 83.

[28] *California v. Trombetta* (1984) 467 U.S. 479.

The trial court asked Fifita's defense counsel if he would like to be heard, and counsel said, "No, Your Honor." The trial court denied Fifita's motion.[29]

Fifita thereafter asked why the trial court had not told him after trial that they were coming back for sentencing today. The trial court said that it had mentioned sentencing, and that Fifita waived time. Fifita asked how he waived time. Fifita's counsel stated that they had waived time. Fifita then asked for a continuance. The trial court denied the request. Fifita again asked to represent himself. The trial court again denied the request and proceeded to sentencing.

B. Relevant law

A criminal defendant has the right under the Sixth Amendment to represent himself at trial. (*Faretta*, *supra*, 422 U.S. at p. 807.) "The right of self-representation is absolute, but only if a request to do so is knowingly and voluntarily made and if asserted a reasonable time before trial begins. Otherwise, requests for self-representation are addressed to the trial court's sound discretion." (*People v. Doolin, supra,* 45 Cal.4th at p. 453.)

In determining timeliness, the sentencing hearing is considered "a proceeding separate and distinct from the trial." (*People v. Miller* (2007) 153 Cal.App.4th 1015, 1024.) Thus, a defendant who was represented by counsel at trial has an absolute right to represent him or herself at the sentencing hearing if the assertion is timely made. (*Ibid.*) "Much as a request to represent oneself at trial must be made a reasonable time before trial commences, the request for self-representation

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[29] It is unclear whether the trial court was denying a *Faretta* motion (again) or some sort of discovery motion.

at sentencing must be made within a reasonable time prior to commencement of the sentencing hearing." (*Ibid.*) Our Supreme Court has held that a request made on the day of the sentencing hearing is untimely. (*People v. Doolin*, *supra*, 45 Cal.4th at pp. 454–455.)

In exercising its discretion to decide whether to grant an untimely motion for self-representation, "the trial court shall inquire *sua sponte* into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is later required. Among other factors to be considered by the court in assessing such requests made after the commencement of trial are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*People v. Windham* (1977) 19 Cal.3d 121, 128.)

C. Analysis

Applying these legal principles, we conclude that the trial court acted well-within its discretion in denying Fifita's request for self-representation. He made the request belatedly—on the day of the sentencing hearing.

Even if his *Faretta* motion had been timely, the trial court had sufficient reason to deny it. (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1206.) For example, as the trial court found, Fifita's claim that defense counsel made no "argument" and no "rebuttal" is belied by defense counsel's closing argument that vigorously attacked the prosecution's case for being unable to tie him to the crimes through witnesses, videos, or cell phone

records. Defense counsel also explained that Fifita used "we" or "they" to refer to the TCG as a collective group when being heard on the wire-tapped calls and thus had not admitted personal culpability. In addition, defense counsel presented a unifying theme that law enforcement had been targeting the TCG for some time and were looking to "destroy" it through whatever means possible. As such, Fifita's dismissive attitude towards his counsel's performance is not borne out by the record.

Indeed, Fifita's reason for wanting to proceed in propria persona showed that much of his bitterness lied in his inability to comprehend what constituted a viable and effective defense. He claimed that the new evidence that he wanted to bring to the trial court's attention was that the victims possessed narcotics, making them "un-credible." Of course, even if such evidence were admissible, it would have had absolutely no effect on the case, as the surviving victims' descriptions of the suspects were credible; they had no reason to lie about who shot and almost killed them. Moreover, their testimony played only a minor role in the identification of the shooters and their cohorts. Rather, the prosecution's case rested heavily on surveillance video, third party witnesses, cell phone evidence, ballistics, and damning out-of-court admissions. It follows that the trial court properly exercised its discretion in denying Fifita's request.

D. Harmless error

Even if the trial court had erred in denying Fifita's *Faretta* motion, which it did not, that motion was untimely and any error in denying it would have been harmless; there was no reasonable probability of a more favorable result in the absence of the error. (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050.) Fifita cannot

demonstrate that he would have obtained a more favorable result in this case had he began representing himself at sentencing. In fact, "[i]t is candidly recognized that a defendant who represents himself virtually never improves his situation or achieves a better result than would trained counsel." (*Id*. at p. 1051.) Here, even if Fifita had been allowed to represent himself and thereafter filed a motion for new trial, the reasons for that motion, as previously demonstrated, were simply inadequate to warrant a new trial. Accordingly, any error was harmless.

VII. *Sentence Based on Fifita's "Strike" Prior and Serious Felony Prior*

Fifita argues that the trial court improperly imposed a sentence based on prior convictions that had not been admitted or proven, and thereafter, improperly allowed the prosecution to reopen proceedings to prove those convictions.

A. Relevant proceedings

On November 30, 2018, the trial court pronounced judgment, imposing a sentence on Fifita based on a prior strike and a prior serious felony enhancement. Apparently none of the parties realized at that point that those convictions had not yet been proven or admitted.

Thereafter, on December 14, 2018, the trial court conducted a hearing to address this error. Fifita, represented by counsel, was present at the hearing.

At the onset of the hearing, the trial court stated: "Just for the record, I checked the transcript, and it appears that [Fifita] waived jury on the priors, but . . . did not admit the priors." The trial court then engaged in an extended conversation with Fifita, trying to explain the purpose of this hearing. Eventually, the

trial court asked Fifita's trial counsel if he had anything further to add. When he said "No," the trial court stated that it was time for the trial on Fifita's priors. Without objection, the prosecution presented a section 969b packet and R.A.P. sheet to prove the priors. The trial court then found the prior conviction allegations true, and Fifita was resentenced for the same amount of time as he had on November 30, 2018.

B. Relevant law

"[G]enerally a trial court lacks jurisdiction to resentence a criminal defendant after execution of [the] sentence has begun." (*People v. Howard* (1997) 16 Cal.4th 1081, 1089.) But, there are exceptions to this rule. (See *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1205–1206.) For example, an unauthorized sentence may be corrected at any time. (*Id.* at p. 1205.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case . . . . [L]egal error resulting in an unauthorized sentence commonly occurs where the court violates mandatory provisions governing the length of confinement." (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

Section 1170, subdivision (d), as it existed at the time of the proceeding in December 2018, provided in pertinent part: "When a defendant . . . has been sentenced to be imprisoned in the state prison . . . and has been committed to the custody of the secretary or the county correctional administrator, the court may, within 120 days of the date of commitment on its own motion . . . recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is

no greater than the initial sentence." (§ 1170, subd. (d)(1).) This provision created "an exception to the common law rule that the court loses resentencing jurisdiction once execution of sentence has begun." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 455.)

"However the exception provided by section 1170[, subd. (d),] is not without limitations. A court may recall a sentence *only* for reasons 'rationally related to lawful sentencing.' [Citations.]" (*People v. Alanis* (2008) 158 Cal.App.4th 1467, 1475.)

C. Analysis

That is exactly what occurred here. At the November 30, 2018, hearing, Fifita was sentenced based upon a prior strike and a prior serious felony enhancement. When the trial court learned that the priors had not yet been proven or admitted, it acted promptly and properly to correct the error—it held a hearing within two weeks and, based upon the evidence presented, found the priors true. And the trial court then imposed the same sentence.

Urging us to reverse, Fifita argues that the trial court did not simply resentence him; instead, it improperly allowed a trial. The problem is that Fifita failed to object in the trial court. While he may have been confused as to what was occurring, he was represented by counsel, who did not object, despite being given the opportunity to do so. It follows that Fifita has forfeited this objection on appeal. (See *People v. French* (2008) 43 Cal.4th 36, 46 [a defendant may forfeit his right to challenge the denial of a jury trial by failing to object to the court trial]; *People v. Vera* (1997) 15 Cal.4th 269, 277.)

Even if the issue had not been forfeited, any error by the trial court would be harmless. The erroneous denial of a right to a jury trial on prior conviction allegations is reviewed for harmless error under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, which asks whether it is reasonably probable that a result more favorable to the defendant would have been reached absent the error. (*People v. Epps* (2001) 25 Cal.4th 19, 29 (*Epps*).)

As in *Epps*, the alleged error could not possibly have affected the result, as official government documents presumptively established Fifita's priors, and Fifita does not claim otherwise. (See *Epps*, *supra*, 25 Cal.4th at pp. 29–30; Evid. Code, § 664 ["It is presumed that official duty has been regularly performed"].) Without objection, the prosecution presented certified records in compliance with section 969b as well as a R.A.P. (record of arrests and prosecutions) sheet, which reflected Fifita's prior commitment and prior strike. It follows that there is no basis for reversal.

VIII. *The 10-year Gang Enhancement on Count 10 is Stricken as to Fifita*

Without specifying the count, Fifita contends that one of the gang enhancements should be stricken rather than left unimposed. The People assume that he is referring to count 10 and agree that the 10-year gang enhancement on this count should be stricken. We agree with the parties.

When the trial court sentenced Fifita, it refrained from imposing the gang enhancement in connection with count 10. Pursuant to *People v. Vega* (2013) 214 Cal.App.4th 1387, 1397, the trial court was required to either impose or strike the gang

enhancement. Given that the gang enhancement was left unimposed, it must be stricken.

IX. *CALCRIM Instructions on Murder and Attempted Murder*

Ventura-Leon argues that the trial court committed reversible error by instructing the jury with CALCRIM Nos. 600[30] (attempted murder) and 520[31] (murder) because those

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[30] CALCRIM No. 600, as given below, provided: "The defendants are charged with attempted murder. [¶] To prove that a defendant is guilty of attempted murder, the People must prove that: [¶] 1. A defendant took at least one direct but ineffective step toward killing another person; [¶] AND [¶] 2. The defendant intended to kill that person. [¶] A *direct step* requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt. [¶] A person who attempts to commit murder is guilty of attempted murder even if, after taking a direct step toward killing, he or she abandons further efforts to complete the crime, or his or her attempt fails or is interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing the murder, then that person is not guilty of attempted murder."

[31] CALCRIM No. 520, as given below, provided: "The defendants are charged with murder in violation of *Penal Code section 187*. [¶] To prove that the defendant is guilty of this

instructions allowed the jury to find him guilty of attempted murder on an implied malice theory; such a theory is impermissible because attempted murder requires the specific intent to kill. Specifically, Ventura-Leon asserts that the "malice aforethought" instruction in CALCRIM No. 520 might have confused the jury as to the mental state required for attempted murder. Fifita joins in this argument.

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crime, the People must prove that: [¶] 1. A defendant committed an act that caused the death of another person; [¶] AND [¶] 2. When that defendant acted, he had a state of mind called malice aforethought. [¶] There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] A defendant acted with *express malice* if he unlawfully intended to kill. [¶] A defendant acted with *implied malice* if: [¶] - He intentionally committed an act; [¶] - The natural and probable consequences of the act were dangerous to human life; [¶] - At the time he acted, he knew his act was dangerous to human life; [¶] AND [¶] - He deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time. [¶] An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] If you decide that a defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in Instruction 521."

A. Relevant law

Attempted murder requires proof of a direct but ineffectual act done towards killing another human being and the specific intent to unlawfully kill another human being. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467, overruled in part on other grounds in *People v. Mesa* (2012) 54 Cal.4th 191, 199.) Attempted murder requires the specific intent to kill. (*People v. Smith* (2005) 37 Cal.4th 733, 739.)

"Malice" aforethought meanwhile, can be express or implied: It is express when the defendant manifests "a deliberate intention to unlawfully take away the life of a fellow creature" (§ 188); it is implied when "'"the killing proximately resulted from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."'" (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1218.)

We consider the instructions as a whole to determine whether there is a reasonable likelihood that the jury improperly construed them to convict a defendant of attempted murder on the theory of implied malice. (*People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.)

B. Analysis

Applying these legal principles, we conclude that the trial court properly instructed the jury with CALCRIM No. 600. It correctly states the elements of attempted murder, unambiguously instructing that attempted murder requires proof beyond a reasonable doubt that a defendant must have "intended

to kill" his victim. (CALCRIM No. 600.) Nothing in this instruction suggests that the jury could have found Ventura-Leon guilty of attempted murder with implied malice.

The placement of the instructions also made confusion unlikely. The language about implied malice was contained in CALCRIM No. 520, the instruction on murder, which by its introductory sentence, clearly flagged for the jury that the content therein pertained to the murder charge. After all, there was an express reference to section 187, and the statute was underlined and italicized for the jury. Because the language defining the two kinds of malice was not set forth in a separate instruction, but built into the instruction defining murder, there was no reason for the jury to reach inside that instruction and export a principle for use in consideration of another charge, defined in another instruction. Indeed, CALCRIM No. 600, the instruction on attempted murder, was given after two other instructions were given. It follows that the instruction on attempted murder and the implied malice language were insulated from each other, removing any chance that the jury found attempted murder based on implied malice.

People v. Beck (2005) 126 Cal.App.4th 518 does not compel a different result. In that case, the Court of Appeal reversed a defendant's conviction for attempted murder because the jury instructions and the prosecutor's argument permitted a conviction of attempted murder based on implied malice, without a finding of intent to kill. (*Id.* at pp. 521–523.) Notably, a separate and entire instruction was devoted to the concept of malice, both express and implied, thus making it more readily capable of being mistakenly paired with another instruction. (*Id.*

at p. 522.) And, the implied malice instruction "immediately followed" the attempted murder instruction. (*Id*. at pp. 522–523.) Furthermore, there was no murder charge in that case to which implied malice might have applied, rendering the instruction technically superfluous but practically available for use by confused jurors to evaluate attempted murder. (*Id*. at p. 521.) Making matters worse, the prosecutor told the jury that it could consider implied malice in finding attempted murder. (*Id*. at p. 523.)

Here, in contrast, murder was charged. And, the implied malice language was self-contained inside an instruction defining murder (CALCRIM No. 520). Under these circumstances, implied malice was not a floating legal concept that invited application to other charges; nor was the implied malice instruction immediately placed after the instruction on attempted murder. And, the prosecutor in this case did not tell the jury that attempted murder could be based on implied malice. It follows that there was no reasonable likelihood that the jury used the concept of implied malice to determine the charge of attempted murder.

C. Harmless error

Even if the instructions had a potential to be confusing, there is no doubt that the jury found that Ventura-Leon had the intent to kill. (*Chapman v. California* (1967) 386 U.S. 18, 24 [in assessing error when an implied malice instruction is given for attempted murder, we consider whether the error was harmless beyond a reasonable doubt]; *People v. Lee* (1987) 43 Cal.3d 666, 676 (*Lee*).) The jury was instructed that "[t]he defendant acted *willfully* if he intended to kill." And, the jury found that the

attempted murders were willful, premediated, and deliberate, necessarily meaning it found an intent to kill. Moreover, as set forth above, there is no evidence here that the prosecutor argued anything other than Ventura-Leon's intent to kill when he committed his crimes.[32] Finally, as set forth above, the evidence of Ventura-Leon's intent to kill was "quite strong." (*Lee*, *supra*, at p. 677.) Under these circumstances, even if there had been instructional error, which there was not, any error was harmless. (*People v. Collie* (1981) 30 Cal.3d 43, 62 [verdict of premeditation and deliberation entails a specific intent to kill and thus instructional error harmless].)

X. *Conspiracy Instruction Cross-referencing the Murder Instruction*

Ventura-Leon contends that the instructions on murder and conspiracy to commit murder were inconsistent and likely confused the jury on the necessary mental state for conspiracy. Specifically, he claims that by cross-referencing the instruction on murder, the conspiracy instruction essentially allowed the jury to erroneously consider implied malice murder as a basis for the alleged conspiracy to commit murder. Fifita joins in this argument.

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[32] In fact, defense counsel for Tonga and Ventura-Leon emphasized during closing argument that intent to kill was required for both the murder and attempted murder counts. And they argued that evidence of their clients' intent was absent. Thus, we do not think the jury would have been confused or otherwise rendered a conviction for attempted murder based upon implied malice.

Assuming without deciding that the trial court erred, any such error was harmless.

A. Relevant law

As to the conspiracy to commit murder charge, the trial court gave the following instruction pursuant to CALCRIM No. 563: "The defendants are charged with conspiracy to commit murder in violation of *Penal Code section 182*. [¶] To prove that a defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant intended to agree and did agree with one or more of the other defendants or co-participants to intentionally and unlawfully kill; [¶] 2. At the time of the agreement, the defendant and one or more of the other alleged members of the conspiracy intended that one or more of them would intentionally and unlawfully kill a person; [¶] 3. One of the defendants or all of them committed at least one overt act to accomplish the killings; [¶] AND [¶] 4. At least one of these overt acts was committed in California."

The instruction continues: "The People's alleged overt acts are previously listed in Instruction 415. [¶] To decide whether a defendant or co-participant committed an overt act, consider all of the evidence presented about the overt act. [¶] To decide whether a defendant and one or more of the other alleged members of the conspiracy intended to commit murder, please refer to Instructions 520 and 521 which define that crime. [¶] The People must prove that the members of the alleged conspiracy had an agreement and intent to commit murder. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit that crime. An agreement may be inferred

from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime. [¶] An *overt act* was previously defined in Instruction 415. [¶] You must all agree that at least one alleged overt act was committed in California by at least one alleged member of the conspiracy, but you do not have to all agree on which specific overt act or acts were committed or who committed the overt act or acts. [¶] You must make a separate decision as to whether each defendant was a member of the alleged conspiracy. [¶] A member of a conspiracy does not have to personally know the identity or roles of all the other members. [¶] Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy. [¶] Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the person was a member of the conspiracy."

CALCRIM No. 520 defines the elements of murder, as previously discussed. CALCRIM No. 521 sets forth the principles of deliberation and premeditation.

The bench notes to CALCRIM No. 563 provide: "Do not cross-reference the murder instructions unless they have been modified to delete references to implied malice. Otherwise, a reference to implied malice could confuse jurors, because conspiracy to commit murder may not be based on a theory of implied malice." (Judicial Council of Cal. Crim. Jury Instns. (2019), Bench Notes to CALCRIM No. 563, p. 312.)

"Conspiracy to commit murder may be based only on express malice, i.e., an intent to kill." (See *People v. Beck and*

Cruz (2019) 8 Cal.5th 548, 642.) To "avoid any confusion about the nature of the intent required for this type of conspiracy," an instruction on conspiracy "should make clear that what is required is a conspiracy to commit first degree murder and an intent to commit first degree murder, respectively." (*Ibid*.)

B. Analysis

Here, the cross-reference to the murder instructions was made in the given instruction on conspiracy to commit murder (CALCRIM No. 563). It appears that the murder instructions were not modified to delete references to implied malice as they relate to the charge of conspiracy as suggested by the bench notes. It is also arguable whether the instructions as given conformed to our Supreme Court's recent suggestion in *People v. Beck and Cruz*, *supra*, 8 Cal.5th at page 642 that it be made clear that "what is required is a conspiracy to commit first degree murder." Nonetheless, even assuming there was error, it was harmless.

Instructional errors such as the one alleged here are reviewed under *Chapman v. California*, *supra*, 386 U.S. at page 24, and the question is whether it can be "determined beyond a reasonable doubt that the erroneous implied malice murder instructions . . . contribute[d] to the conviction[] on the conspiracy count[]." (*People v. Swain* (1996) 12 Cal.4th 593, 607.)

Here, the jury found Ventura-Leon guilty of first degree murder, with premeditation and deliberation being the only theory presented to the jury. Under the trial court's instructions, such a verdict entailed a finding that each defendant acted "*willfully*," i.e., that he "he intended to kill." As such, there is no "reasonable possibility" that the jury convicted Ventura-Leon of

conspiracy to commit murder without first finding an intent to kill.[33] It follows that any instructional error was harmless beyond a reasonable doubt.

XI. *CALCRIM Nos. 362 and 372*

Ventura-Leon argues that CALCRIM Nos. 362 and 372 allowed the jury to make permissive inferences in violation of due process. Specifically, he contends that drawing an inference that a defendant is "aware of his guilt" simply from an act of making false and misleading statements or from an act of flight is not justified by reason and common sense. Fifita joins in this argument.

Like other appellate courts, we reject this argument. (See, e.g., *People v. Price* (2017) 8 Cal.App.5th 409, 454–456; *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1159; *People v. Paysinger* (2009) 174 Cal.App.4th 26, 29–32 [rejecting various arguments that CALCRIM No. 372 is unconstitutional].)

XII. *Alleged Prosecutorial Misconduct*

During closing argument, the prosecutor discussed premeditation and stated: "You come up to a stop sign, everyday life. You're driving. You come up to a stop sign. What do you do? [¶] I am going to look left, I am going to look right. I am going to decide that it's safe to go forward. [Are] there any pedestrians, is it safe to go? [¶] Okay. [¶] You just deliberated and premeditated. You thought about it, it went through your head."

Ventura-Leon argues that using a decision-making process at an intersection to illustrate deliberation and premeditation

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[33] We reach the same conclusion as to Fifita. Like Ventura-Leon, Fifita was convicted of first degree murder.

amounted to misconduct because it mischaracterized the law in a way that diminished the People's burden of proof. Fifita joins in this argument.

A. Forfeiture

As a preliminary matter, we note that Ventura-Leon did not object to this part of the prosecutor's closing argument. He also did not request an admonition to the jury to disregard it. As such, he forfeited this objection on appeal. (*People v. Peoples* (2016) 62 Cal.4th 718, 797.)

Ventura-Leon argues that we "may consider the prosecutorial misconduct and related constitutional arguments despite the failure to specify them in the trial court because they essentially involve questions of constitutional law based on the undisputed facts set forth in the record." And a new theory may be raised on appeal where the facts are not disputed and the party raises a new question of law. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 741–742.) He also asserts that his failure to object and/or request an admonishment should be excused "because the misconduct was so serious that admonition of the jury would not have cured the harm." And, he urges us to find that the issue was "preserved to avoid the necessity of having to consider the issue by way of an ineffective assistance of counsel claim."

While we are not convinced by Ventura-Leon's arguments, for the sake of completeness, we address the merits of his claim of prosecutorial misconduct.

B. Relevant law

Under state law, a prosecutor who uses deceptive or reprehensible methods to persuade either the trial court or the jury has committed misconduct, even if such action does not

render the trial fundamentally unfair. (*People v. Morales* (2001) 25 Cal.4th 34, 44; *People v. Hill* (1998) 17 Cal.4th 800, 819.) "[P]rosecutorial misconduct implicates the defendant's federal constitutional rights only if it is so egregious that it infect the trial with such unfairness as to make the conviction a denial of due process. [Citation.]" (*People v. Harris* (1989) 47 Cal.3d 1047, 1084.) Generally, misstatements of the law constitute misconduct. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 36; *People v. Mendoza* (1974) 37 Cal.App.3d 717, 726–727.)

C. Analysis

Here, the prosecutor did not misstate the law.

"'"Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance.' [Citation.] 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides . . . which are the result of mere unconsidered or rash impulse hastily executed.' [Citation.]" (*People v. Brooks* (2017) 3 Cal.5th 1, 58.)

"Counsel trying to clarify the jury's task by relating it to a more common experience must not imply that the task is less rigorous than the law requires." (*People v. Centeno* (2014) 60 Cal.4th 659, 671.) Here, the prosecutor's comparison of premeditation with looking both ways and looking out for pedestrians before proceeding through a stop sign does not violate this rule. Similar arguments by prosecutors have been upheld by the Supreme Court. (*People v. Avila* (2009) 46 Cal.4th

680, 715 ["assessing one's distance from a traffic light, and the location of surrounding vehicles, when it appears the light will soon turn yellow and then red, and then determining based on this information whether to proceed through the intersection when the light does turn yellow, [is] an example of a 'quick judgment' that is nonetheless 'cold' and 'calculated'"]; see also *People v. Osband* (1996) 13 Cal.4th 622, 697 [finding no misconduct where the prosecutor argued that the defendant's reasoning process need not be evaluated "by a standard befitting Albert Einstein" and that the jury need not find that he "weighed the consequences as much or as long as might 'regular, civilized people, who aren't criminals, who would never think of [doing] such a thing'"].) For these reasons, the prosecutor did not commit misconduct or diminish the People's burden of proof in this case.

Moreover, there was no reasonable probability that the outcome would have been different absent the prosecutor's comments, or that there was any unfairness amounting to denial of due process. As previously indicated, the trial court instructed the jury with the definitions of premeditation and deliberation. The jury was also told, "You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." We presume the jury followed the trial court's instructions. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 172.)

In addition, evidence showing premeditation and deliberation was abundantly present in this case. (See *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [evidence of premeditation include motive, planning, and manner of killing].) The People

presented evidence of appellants traveling around with other gang members in a caravan of two vehicles searching for victims, shooting them, and conferring at a restaurant in between the shootings; this evidence demonstrated motive, planning, and acts that showed intentional killing according to a preconceived design. Given the trial court's instructions coupled with the evidence of premeditation and deliberation, Ventura-Leon suffered no prejudice under any standard. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

XIII. *Sufficient Evidence to Sustain Lauaki's Convictions in Counts 5, 6, and 10*

Relying upon his argument that there was insufficient evidence to support the conspiracy charge against him, Lauaki argues that there was insufficient evidence to sustain his convictions for the murder of Campos, the attempted murder of Young, and the attempted murder of Coburn. Fifita and Ventura-Leon join in this argument.

As set forth above, there was ample evidence of Lauaki's involvement in the shootings as an aider and abettor, including his admissions to being involved in the shootings, his admission to being at the meeting at Yoshinoya, his arrival at Yoshinoya and departure in the two vehicles spotted at the Redfern Avenue shooting (where Coburn was shot) and at the donut shop shooting (where Campos was killed and Young was shot). Thus, his argument fails.

XIV. *Alleged Cumulative Error*

Fifita and Lauaki each contend that the alleged errors, when combined, created cumulative prejudice, requiring reversal

of the judgments against them. However, "[l]engthy criminal trials are rarely perfect, and [courts] will not reverse a judgment absent a clear showing of a miscarriage of justice." (*People v. Hill, supra,* 17 Cal.4th at p. 844.) No such showing appears here. There were no errors. And, even if there were, they were harmless. They did not combine to render this trial unfair. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009 [defendants are entitled to a fair trial, not a perfect one].)

DISPOSITION

The gang enhancement left unimposed against Fifita in connection with his sentence on count 10 is stricken. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT